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## Dedication

This dissertation is dedicated to my mother Emmah Nana Mdluli, and my daughter Lwandle Raolane for their continued support and inspiration.

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I would like to thank my entire family for encouraging and motivating me in my studies since I commenced with my LLM degree studies.

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# CHAPTER 1

## THE ORIGIN OF ONLINE CONSUMER PROTECTION IN SOUTH AFRICA

### I. INTRODUCTION

Electronic commerce, also known as online consumer shopping,<sup>1</sup> has become one of the fastest growing forms of commercial transacting worldwide,<sup>2</sup> and South Africa as part of the global community has found itself having to adapt at a very fast pace. Na Ling and Ping Zhang argue that online shopping has become the third most popular internet activity, following e-mail usage and web browsing.<sup>3</sup> Convenience, competitive prices, efficiency and saving on time and travel costs are some of the reasons why online shopping is growing and becoming institutionalised.<sup>4</sup> Further, online shopping can be done at any time of the day and anywhere, as opposed to offline shopping which requires the consumer to physically visit the shop in question. It can then be declared without a doubt that “internet and electronic commerce have emerged as the emblems of a worldwide virtual economy”.<sup>5</sup>

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<sup>1</sup> See Na Li and Ping Zhang ‘Consumer Online Shopping Attitudes and Behavior: An Assessment of Research’ (2002) *Eighth Americas Conference on Information Systems* at 508.

<sup>2</sup> Ibid. Li and Ping argue further that online shopping has become one of the most essential characteristics of the internet or World Wide Web era.

<sup>3</sup> Ibid.

<sup>4</sup> See Erin Ann O’Hara ‘Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection’ (2005) *University of Pennsylvania Law Review* 153 at 1883. In this study, O’Hara argues that millions of consumers regularly buy goods online and that this has become a billion dollar industry. The reason for the growth every year is attributed to efficiency benefits regarding online purchases and that vendors are able to save large amounts of money which are normally associated with maintaining a fully-fledged shop and employment of personnel. For these reasons, internet transactions will continue to be a huge success.

<sup>5</sup> Madeleine de Cock Buning, Ewoud Hondius, Corien Prins and Marc de Vries ‘Consumer@Protection.EU. An Analysis of European Consumer Legislation in the Information Society’ (2001) *Journal of Consumer Policy* 24 at 287.



The electronic commerce (e-commerce) phenomenon started in other countries during the 1990s,<sup>6</sup> and South Africa soon followed suit a few years later.<sup>7</sup> During the early years of the evolution of e-commerce in South Africa, online consumer protection was regulated by common law and other legislation which have since been repealed, namely, Usury Act 73 of 1968, Credit Agreements Act 75 of 1980 and the Consumer Affairs Act 89 of 1998 and other relevant industry codes and guidelines.<sup>8</sup> At the current stage,<sup>9</sup> where such change started around early 2000, South African online consumer protection is governed by the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act), National Credit Act 34 of 2005 (the NCA), the Consumer Protection Act 68 of 2008 (the CPA) and the Protection of Personal Information Act 4 of 2013 (the POPI Act).<sup>10</sup>

The legislative developments were informed by various international instruments such as the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce 1999<sup>11</sup> (OECD Guidelines on Consumer Protection) and the European Distance Selling Directive.<sup>12</sup> The OECD Guidelines on Consumer Protection analyses and recognises amongst others that e-consumers have special needs that require special attention, which includes:<sup>13</sup>

“(a) the recognition that electronic commerce may offer consumers new and substantial benefits, including convenience, access to a wide range of goods and services, and the ability to gather and compare information about such goods and services;

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<sup>6</sup> Ibid. de Cock Buning et al reason that “in the early 1990s, few consumers had heard of email, Internet, and the World Wide Web”. More than ten years later, a large number of online retailers are starting their online businesses for the purpose of attracting the ever-increasing large number of online consumers who have the quest of experiencing on a global scale, the “advantages of shopping in a borderless on-line environment”.

<sup>7</sup> See for instance a dissertation by Mildred Geel ‘Profiling the Customers of the E-Commerce Company Kalahari.Net’ (2003) University of South Africa. In this study, Geel profiles customers of Kalahari. net, and briefly touches on the history of the development of e-commerce in South Africa.

<sup>8</sup> Sylvia Papadopoulos ‘Online Consumer Protection’ In S Papadopoulos and S Snail (eds) *Cyberlaw@SA III* (2012, Van Schaik) 63.

<sup>9</sup> As at 2014, when the dissertation was written.

<sup>10</sup> Papadopoulos op cit at 63.

<sup>11</sup> Available at [http://www.oecd.org/document/51/0,2340,en\\_2649\\_201185\\_1824435\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/51/0,2340,en_2649_201185_1824435_1_1_1_1,00.html) <http://www.oecd.org/dataoecd/5/34/1824782.pdf>, accessed on 20 June 2014. Also see note 35.

<sup>12</sup> (EC) 97/7 [1997] OJ L144/19.

<sup>13</sup> Ibid.

- (b) the recognition that there are certain special characteristics of electronic commerce, such as the ease and speed with which businesses and consumers can communicate about goods and services and engage in cross-border transactions;
- (c) the recognition that electronic commerce may create commercial situations which are unfamiliar to consumers and which may put their interests at risk; and
- (d) the recognition that consumer confidence in electronic commerce is enhanced by the continued development of transparent and effective consumer protection mechanisms that limit the presence of fraudulent, misleading or unfair commercial conduct online”.

It is against this background that it has become increasingly important for consumers (and businesses) to be informed and aware of their rights and obligations in the electronic marketplace.<sup>14</sup>

## II. E-COMMERCE IN CONTEXT

### *Case studies of online retailers*

The advancement of the electronic commerce around the world, and South Africa in particular, is illustrated through two cases studies of online retailers, namely, Amazon.com and Kalahari.com.

*Amazon.com* (Amazon), an internationally well-known online retail shop was founded in 1994 and started selling books online.<sup>15</sup> Amazon is reportedly one of the largest and leading online retailers in the world which since its establishment, has grown exponentially and now operates web sites that offer various products and services, which include: music, DVDs, videos, electronics, camera and photography, clothing apparel, shoes, and e-books.<sup>16</sup> “With revenues of \$48,077 million in FY2011, Amazon is much bigger in size than its close competitor eBay (revenues of \$11,651.7 million in the financial year ended December 2011), and Barnes & Noble (revenues of \$7,129.2 million in the financial year ended April 2012).

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<sup>14</sup> Ibid.

<sup>15</sup> See Amazon.com, Inc. regarding the history of Amazon.com. Dustin Nadeau, Donatas Sumyla, David Deprey and Jaime Rodriguez Bus 411, April 2006. Powerpoint.

<sup>16</sup> Ibid.

Amazon was ranked among top 100 of America's largest corporations by a business magazine in 2012".<sup>17</sup>

*Kalahari.com* (Kalahari) is South Africa's number one online shop and is regarded as a market leader in South African e-commerce and has grown immensely to be considered as the South African Amazon.com.<sup>18</sup> Kalahari was established in October 1998, and is SA's largest online shop and stocks more than 8 million products which includes, books, eBooks, eReaders, software, music, CDs, DVDs, games, appliances, homeware, cameras and electronics which are available for browsing and purchase on the internet.<sup>19</sup> Regarded as a pioneer in South African e-commerce industry, Kalahari is reported to be offering unequalled customer choice and service and is growing, as more consumers are beginning to join the world of online shopping.<sup>20</sup> With the emergence of the online market place, which connects buyers and sellers together on one platform, Kalahari has become one of the biggest online retailers in Africa. Kalahari offers top selling products at the click of a mouse which are available on 24 hour delivery through the use of various secure payment options, door-to-door delivery, wish list, vouchers and free delivery on orders over R250.<sup>21</sup>

I concur with Geel's assertion<sup>22</sup> that the electronic commerce phenomenon is expected to increase due to reasons that South African Internet users, have identified a number of critical aspects regarding online shopping that they consider important. "The eight most important aspects as identified by South African consumers in order of importance are:<sup>23</sup>

a) Security of personal details;

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<sup>17</sup> See Company Profile of Amazon.com, Inc. Marketline 2B52E1D8-E964-4D7F08B1B-C48DBC97815F December 2012 at 3 – 5, available at [www.marketline.com](http://www.marketline.com). In terms of the swot analysis, Amazon is a global player and "offers products in various categories through its e-commerce website [www.amazon.com](http://www.amazon.com) in the US and through [www.amazon.co.uk](http://www.amazon.co.uk), [www.amazon.de](http://www.amazon.de), [www.amazon.fr](http://www.amazon.fr), [www.amazon.co.jp](http://www.amazon.co.jp), [www.amazon.cn](http://www.amazon.cn), and [www.amazon.it](http://www.amazon.it) in international markets".

<sup>18</sup> See [www.kalahari.com](http://www.kalahari.com), accessed on 8 June 2014. It should be noted that Kalahari initially started operating as Kalahari.net, and later changed to Kalahari.com; Geel op cit at 9 argues that Kalahari is a South African e-commerce company which has since its introduction into the internet industry, tremendously grown in leaps and bounds and "is considered as the South African Amazon.com".

<sup>19</sup> [www.kalahari.com](http://www.kalahari.com), accessed on 8 June 2014.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Geel op cit at 7.

<sup>23</sup> Ibid.

- b) Reliability of the online retailer;
- c) Convenience;
- d) The ease of finding the product online;
- e) Speed of Internet access;
- f) Price of the item;
- g) Ability to make a more informed purchase; and
- h) No pressure from a salesperson.”

It is, however, important to mention that online shopping is not without any risks, shortcomings or disadvantages. In this growing trend of electronic commerce where online consumers do not have the opportunity of physically inspecting the goods and services they are about to purchase and thereby making an informed decision,<sup>24</sup> there can be no doubt that e-commerce needs to be regulated in order to protect online consumers against service providers, some of whom may be untrustworthy,<sup>25</sup> and to preserve the integrity of online consumer shopping. Consumers therefore need to be protected against several issues, which include the following:<sup>26</sup>

- a) the bargaining strengths between the consumer and the supplier which are unequal;
- b) confusing and complex documents or contracts;
- c) undue influence or pressure to buy from online retailers;
- d) misleading marketing practices or advertising;
- e) identical or equivalent goods may be cheaper somewhere else;
- f) inability to make an informed choice due to insufficient information regarding the specific product or service; and
- g) privacy issues where consumers require that their personal information be protected against unauthorised access or disclosure and criminal elements.<sup>27</sup>

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<sup>24</sup> Sizwe Lindelo Snail ‘South African e-consumer law in the context of the ECT Act (part 1)’ 15 *JBL* at 40.

<sup>25</sup> See Michael Donohue, ‘Building trust Online: Work at the OECD’, available at [www.hcch.net/upolad/wop/e-comm\\_donohue.pdf](http://www.hcch.net/upolad/wop/e-comm_donohue.pdf), accessed on 22 August 2014.

<sup>26</sup> Caroline B Ncube ‘Consumer Protection: Electronic Transactions Law’ University of Cape Town. Licensed under the Creative Commons Attribution-NonCommercial-ShareAlike 2.5 South Africa License 2012 at 3. Powerpoint.

<sup>27</sup> See for instance, Bidorbuy, an online retailer and online auctioneer where it is reported in the website that security is still regarded as one of the inhibiting factors to online shopping where consumers are often hesitant to

The OECD Guidelines on Consumer Protection, discussed above,<sup>28</sup> outline seven consumer protection principles that are applicable only to business-to-consumer electronic commerce and not to business to business transactions which are:

*a) Transparent and effective protection*

Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

*b) Fair business, advertising and marketing practices*

Businesses engaged in electronic commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices. Businesses should not make any representation, or omission, or engage in any practice that is likely to be deceptive, misleading, fraudulent or unfair.

*c) Online disclosures*

Businesses engaged in electronic commerce with consumers should provide accurate, clear and easily accessible information about themselves sufficient to allow, at a minimum: identification of the business; appropriate and effective resolution of disputes and service of legal process.

*d) Confirmation process*

To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and should be able to cancel the transaction before concluding the purchase.

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engage in internet transaction due to fear of being "e-burgled or having their confidentiality breached. Available at [www.bidorbuy.co.za/.../South\\_Africa's\\_Largest\\_Online\\_Shopping\\_and\\_Au...](http://www.bidorbuy.co.za/.../South_Africa's_Largest_Online_Shopping_and_Au...), accessed on 21 August 2014.

<sup>28</sup> See note 11 supra.

*e) Dispute resolution and redress*

This principle covers both applicable law and jurisdiction, and alternative dispute resolution and redress, and requires consumers to be provided with meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden.

*f) Privacy*

Business-to-consumer electronic commerce should be conducted in accordance with the recognised privacy principles set out in the OECD Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data.

*g) Consumer education and awareness*

Governments, business, media and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.

### III. CRITICAL QUESTIONS REGARDING E-COMMERCE

Having discussed the above issues regarding the evolution and increase of online shopping in South Africa and abroad and the reasons why this trend will continue to dominate the internet space for years to come, there are important questions that would often arise in the mind of an online consumer. These questions are:

1. is it safe to transact online?
2. will my personal information and privacy be protected?
3. will the contract be legally binding and enforceable?
4. which jurisdiction will have the authority to hear the matter in case of a dispute?
5. will the goods be delivered by the service provider?
6. is there an obligation on the supplier to perform or can I trust the supplier?
7. will there be any legal recourse in case the transaction does not go according to my expectations, for instance, where goods are not delivered or in the case of dissatisfaction with the goods that were delivered by the online retailer? and
8. is e-commerce regulated in terms of the law?

My over-arching research question or topic in this dissertation is “the analysis of the nature and extent of online consumer protection by South African legislation, namely, the ECT Act,

CPA and POPI Act”. In conducting this analysis I therefore endeavour to answer questions 1 to 8 posed above, as comprehensively as possible and then come up with recommendations or propose solutions, where relevant.

#### IV. MOBILE HANDSET TECHNOLOGY (M-COMMERCE)

The development of mobile handset technology, and in particular the smart phone brought about what is today known as mobile e-commerce or M-commerce, which most consumers make use of for e-commerce transactions.<sup>29</sup> M-commerce refers to:

“commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services (SMS), multimedia message service (MMS), or the internet, using small handheld mobile devices that typically are used for telephonic communications “.<sup>30</sup>

M-commerce services are often used by mobile vendors as a means of selling goods and services through mobile platforms, either directly or indirectly to mobile subscribers or cellphone users.<sup>31</sup> As a result, Papadopoulos points out that with the convergence of operating platforms, it is becoming increasingly difficult to distinguish M-commerce from other forms of e-commerce due to the fact that M-commerce is now expanding into internet based e-commerce. Most mobile phones have internet access which makes it easier for any consumer to browse the web and ultimately perform online shopping, via a mobile phone. Mobile phone subscribers can with ease, use their cell phones to access some of the following services:<sup>32</sup>

- a) purchase and download content such as movies, music, ring tones or games;
- b) play online games or gamble;
- c) access online banking and financial services and do financial transactions;
- d) make payments for mobile activities either charged to credit cards or cell phone bills;
- e) purchase goods or services using the phone as a payment device (e-wallet or cash send); or
- f) vote in interactive TV programmes.

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<sup>29</sup> Papadopoulos op cit at 63.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

I concur with Papadopoulos' argument that these types of M-commerce and/or e-commerce transactions raise some critical consumer protection issues which include "the security of payments made via mobile phones and the high penetration of such devices among minors" which can lead to serious problems relating to over-consumption and access to aggressive, inappropriate or prohibited content.<sup>33</sup> With almost every third person having access to smart mobile phone or internet access, it is a well-known fact that cyberspace has over the years become an uncharted territory, wherein without proper regulation, consumers and minors alike can find themselves experiencing abuse of their rights and negative marketing practices.<sup>34</sup>

## V. SOUTH AFRICAN LEGISLATIVE FRAMEWORK GOVERNING ONLINE CONSUMER PROTECTION

As stated above, online consumer protection in South Africa is governed by various statutes which include the ECT Act, the CPA and the POPI Act. Some of these legislative prescripts were drafted and passed by Parliament in accordance with the South African Green Paper on Electronic Commerce<sup>35</sup> and other international instruments such as European Union Directives<sup>36</sup> and Model Law.<sup>37</sup>

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<sup>33</sup> Ibid at 64.

<sup>34</sup> Ibid.

<sup>35</sup> The Green Paper was published by the Department of Communications in November 2000. Chapter 8 of the Green Paper, discusses that consumers must be assured of confidence when conducting online transactions. This chapter investigates and identifies the possible mechanisms of protecting consumers against dangers resulting from the easy and convenience of buying on-line. Ways to resolve disputes between buyers and merchants, redress and enforcement mechanisms are required to gain consumer confidence in the electronic environment.

<sup>36</sup> Such as the European Distance Selling Directive (EC) 97/7 [1997] OJ L144/19, the UNCITRAL Model Law on Electronic Commerce 1996 and the European Union Data Protection Directive (Data Protection Directive) on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, 95/46/EC. The Data protection Directive was adopted by the EU Parliament on 24 October 1995 but only came into operation three years later, on 25 October 1998. The purpose of the Directive is to ensure "the free movement of personal data in the Internal Market" and the protection of personal information of data subjects. In order to ensure protection of the fundamental rights of the citizens of the EU community, the Directive sets out some norms or minimum standards with which member States must comply, whilst also allowing member States some flexibility with regard to the implementation of the data protection provisions in their national legislation.

<sup>37</sup> The ECT Act provisions dealing with functional equivalence were for instance modelled along the UNCITRAL Model Law on Electronic Commerce, 1996.



For instance, some of the ECT Act provisions contained in Chapter VII were modelled on the European Distance Selling Directive<sup>38</sup> (the Distance Selling Directive). The Distance Selling Directive provides a number of fundamental legal rights to distance selling consumers in order to ensure a high level of consumer protection. These include:<sup>39</sup>

- (a) Provision of comprehensive information before shopping;
- (b) Consumer's right to cancel the contract;
- (c) Delivery of the goods or performance of the service within 30 days after the consumer placed his or her order;
- (d) Protection from unsolicited selling; and
- (e) Protection from fraudulent use of payment cards.

## VI. ONLINE CONTRACTING

Snail<sup>40</sup> argues that in principle there are four different ways of e-contracting on the Internet or conducting electronic transactions namely: the email contract which often involves negotiations through the exchange of letters and other relevant documents; contracting through the World Wide Web ('www'), trading by parties under the Electronic Data Interchange Agreement ('EDI') framework, and contracting by natural persons online, through a virtual chat room where in these instances they can make agreements that are legally binding and enforceable.

With regard to the World Wide Web form of electronic contracting, this method is similar to a mail order where one party, normally the seller, maintains the website on which goods and services are advertised for prospective buyers.<sup>41</sup> The prospective buyer who accesses the website would when interested, complete an electronic form for purposes of placing an order of the goods or services from the seller.<sup>42</sup> This method of electronic transacting falls within

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<sup>38</sup> EC 97/7 [1997] OJ L144/19.

<sup>39</sup> Ibid.

<sup>40</sup> Snail op cit at 41.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

the scope of e-consumer law, hence this dissertation focuses on this method.<sup>43</sup> Please note that online contracting within the context of the ECT Act is discussed in Chapter 2 below.

## VII. SCOPE OF THE DISSERTATION

According to Snail,<sup>44</sup> due to the inability by an online consumer to inspect goods and services prior to purchase or delivery, as it is normally done in the physical commercial world (bricks-and-mortar commercial environment), it therefore became vital for legislators to develop e-consumer law. This was necessary in order to afford the online consumer “more consumer protection rights when contracting with e-vendors online, because consumers are clearly more vulnerable to puffing and misrepresentation by the e-vendor”.<sup>45</sup>

As stated in paragraph III above, in this dissertation I consider in broad outline and analyse the nature and extent to which the consumer legislation that was enacted by Parliament since early 2000, protects online consumers. The three statutes discussed in this dissertation are, the ECT Act, CPA and POPI Act. I do not discuss the NCA. My discussion centres on the extent to which these pieces of legislation regulate e-commerce, namely, shopping via the internet, as a means of providing online consumer protection. The discussion therefore does not discuss the regulation of M-commerce (mobile handset commerce).

With the understanding that legislation provides a regulatory framework, I therefore examine the duties imposed on suppliers and prohibitions on suppliers. Also discussed are the different administrative, criminal and civil remedies available to online consumers in the case of non-compliance by suppliers with the provisions of the statutes. Two key aspects of online consumer protection, namely, (a) unsolicited commercial communication (also known as spam) and direct marketing and (b) online auctions are also discussed. Lastly and from a practical point of view, I discuss the dispute resolution mechanisms, interpretation and enforcement of the legislation by the courts (case law) and various other Consumer Protection Forums such as the National Consumer Commission and National Consumer Tribunal.

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

I then conclude the dissertation by making an evaluation on the three statutes, by looking at lessons learnt from the study and also come up with recommendations. From my evaluation, I conclude that generally, the legislation is pro-consumer and, that government complied with the Constitution and other international instruments<sup>46</sup> in ensuring that online consumers' interests are safeguarded. I then recommend that some of the statutes, especially the ECT Act, need to be amended or streamlined in order to incorporate certain critical definitions, provisions and to include a public education and awareness component. With regard to the ECT Act, the Electronic Communications and Transactions Amendment Bill, that was drafted by the Department of Communications and published for public comments in 2012 needs to be introduced in Parliament, so that the key shortcomings in the ECT Act are addressed.<sup>47</sup>

## VIII. OUTLINE OF THE CHAPTERS OF THIS DISSERTATION

The discussion on the legislative regime governing online consumer protection is divided into three parts, and in this specific manner:

Chapter 2, deals with the ECT Act;

Chapter 3, deals with the CPA; and

Chapter 4, deals with unsolicited commercial communications and direct marketing and online auctions, and these aspects are discussed mainly within the context of the CPA and the POPI Act.

In Chapter 5, I discuss the lessons learnt from the study. I then come up with recommendations on the way forward and a conclusion. It must be noted that the terms "supplier" or "service provider" are used interchangeably in this dissertation.

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<sup>46</sup> See instruments such as the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce 1999; European Distance Selling Directive (EC) 97/7 [1997] OJ L144/19, European Union Data Protection Directive 95/46/EC and European Union Directive on Privacy and Electronic Communications 2002/58/EC, some of which were discussed above.

<sup>47</sup> See Notice No. 888 of 2012, Government Gazette No. 35821 published on 26 October 2012.

## CHAPTER 2

### ANALYSIS OF THE ELECTRONIC TRANSACTIONS AND COMMUNICATIONS ACT, 25 OF 2002

#### I. GENERAL PREMISE

In my analysis of the ECT Act in this Chapter, I address all the questions posed in Chapter 1 above, namely: if it is safe to transact online;<sup>48</sup> privacy of personal information;<sup>49</sup> whether an e-commerce contract is legal and enforceable, that is, whether a contract concluded by means of a data message will be legally binding and enforceable;<sup>50</sup> which jurisdiction will hear the matter in case of a dispute;<sup>51</sup> will the goods or services be rendered by the supplier;<sup>52</sup> what happens if the supplier fails to deliver the goods to the online consumer;<sup>53</sup> what recourse will the online consumer have in the event the goods or services do not meet expectations;<sup>54</sup> whether the supplier has an obligation to perform in terms of the contract and whether e-commerce is regulated in terms of South African law.<sup>55</sup> The mere analysis of ECT Act in this chapter means that question 8 of the dissertation is immediately answered; in that at the heart of Chapter VII of the ECT Act is consumer protection which is aimed at e-commerce regulation.

The ECT Act came into operation on 2 August 2002. Chapter VII of the ECT Act contains sections 42 to 49, which deal specifically with consumer protection. This chapter only applies to electronic transactions as a means of giving effect to the objectives of the Act with specific reference to online consumer protection.<sup>56</sup> The objectives of the ECT Act include: the promotion of legal certainty and confidence in respect of electronic communications and

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<sup>48</sup> Question 1.

<sup>49</sup> Question 2.

<sup>50</sup> Question 3.

<sup>51</sup> Question 4.

<sup>52</sup> Question 5.

<sup>53</sup> Question 6.

<sup>54</sup> Question 7.

<sup>55</sup> Question 8.

<sup>56</sup> Snail op cit at 41.

transactions; ensuring that electronic transactions in South Africa are in conformity with international standards; developing a safe and secure environment for the consumer, business and the Government when conducting electronic transactions; and promoting the stability of electronic transactions in South Africa.<sup>57</sup>

Chapter VII provides a number of important safeguards for online consumers, over and above those available to offline consumers,<sup>58</sup> such as the supplier's duty to make certain information available on the website to online consumers (section 43); cooling-off period in instances when a consumer cancels a transaction (section 44); supplier's duty to execute the contract within 30 days (section 47); and the application of foreign law to electronic transactions. In terms of the Schedule to the POPI Act, section 45 dealing with unsolicited communications to consumers for direct marketing purposes will be repealed when the POPI Act comes into operation.<sup>59</sup>

The drafters of the provisions of Chapter VII of the ECT Act took into account the European Distance Selling Directive<sup>60</sup> and these provisions set parameters for South African website owners and suppliers to design their website in accordance with the provisions. For instance, section 43(3) of the ECT Act provides that if the supplier fails to comply, the consumer is empowered to cancel the transaction within 14 days of the delivery of the goods or services.

The assertion by Papadopoulos<sup>61</sup> is correct, that this type of additional protection is necessary taking into account that online consumers are in a weaker bargaining position as they cannot touch, inspect, or test the goods they are about to purchase, the same way as

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<sup>57</sup> See section 2 of the ECT Act, and note that the list mentioned above is not exhaustive.

<sup>58</sup> Papadopoulos op cit at 64.

<sup>59</sup> See <http://www.michalsons.co.za/popi-commencement-date/13109>, accessed on 2 September 2014, where Michalsons stipulates that not all the sections of the POPI Act came into operation in April 2014. Sections that have commenced are "definitions, Part A of Chapter 5, sections 112 and 113" dealing with regulations and procedure for making regulations.

<sup>60</sup> (EC) 97/7 [1997] OJ 1144/19. The Directive came into operation in 1997 after it was adopted by the European Parliament and the Council of the European Union. It deals with the protection of consumers in respect of distance contracts.

<sup>61</sup> Papadopoulos op cit at 65.

offline consumers in physical retail environment do, and the fact that the payment methods need to be secure in order to promote trust in this form of online retailing.

## II. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS AMENDMENT BILL, 2012

It is critical to note that in October 2012, the Department of Communications published the Electronic Communications and Transactions Amendment Bill, 2012 (“the Bill”) for public comments.<sup>62</sup> The Bill seeks to bring about some fundamental changes in the electronic communications industry in general and in the consumer protection, data protection and cyber security spheres. Where relevant, I refer to the Bill particularly in instances where its provisions seek to harmonise and streamline some of the shortcomings that are prevalent in the ECT Act. Key among the proposed amendments in the Bill is that the ECT Act will apply to both natural and juristic persons.<sup>63</sup> At the time of writing, the Bill still had to be introduced in Parliament by the Minister of Communications, meaning that some of its provisions may change once the Bill is introduced and it starts going through the normal legislative process.

## III. E-CONTRACTS IN THE CONTEXT OF THE ECT ACT

Chapter III of the ECT Act titled “Facilitating Electronic Transactions” deals with the legal requirements for data messages and communication of data messages.<sup>64</sup> This is one of the most important chapters in the ECT Act since it has filled the vacuum regarding the validity of online contracts, which has been in existence in South Africa prior to the commencement of the ECT Act in 2002. It is my submission that this chapter has to a substantial degree settled the law with regard to e-commerce and in particular with regard to issues such as signature, writing and formation and validity of contracts.<sup>65</sup> The provisions of Chapter III of the ECT Act have therefore revealed, as will be seen below, that e-commerce contracts are legally binding and enforceable, just like traditional contracts that are concluded in the real or

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<sup>62</sup> See Notice No. 888 of 2012, Government Gazette No. 35821 published on 26 October 2012.

<sup>63</sup> Ibid. See Explanatory Memorandum on the Objects of the Bill.

<sup>64</sup> ss 11- 26.

<sup>65</sup> The legal certainty brought about by the ECT Act, does to a certain degree create peace of mind for the online consumer.

physical world. I must mention that the discussion on e-contracts addresses question 3, namely, whether an e-commerce contract is legally binding and enforceable.

*a) Legal recognition of data messages*

Section 11 of the ECT Act brought about legal uncertainty in South Africa on electronic contracting, particularly on whether a data message<sup>66</sup> constitutes a valid form of contract negotiation and whether such contract can be legally binding between parties.<sup>67</sup> In terms of section 11,<sup>68</sup> “data messages are now a legally recognised form of conducting legal acts, and a contract cannot be invalid merely on the grounds that it is wholly or partly in the form of a data message.”<sup>69</sup> Snail states that section 11(2) and (3) ECT Act makes provision “for incorporation by reference of terms that are not contained in the data message”.<sup>70</sup> An example of incorporation by reference is where an originator of an email attaches or links an e-mail disclaimer.<sup>71</sup>

*b) Writing and signature requirements*

Section 12 of the ECT Act recognises a data message as the functional equivalent of writing<sup>72</sup> and provides that a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and accessible in a manner usable for subsequent reference. Section 22(1) also recognises the validity of agreements concluded either partly or wholly by means of a data message.

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<sup>66</sup> In terms of section 1 of ECT Act, “data message” means data generated, sent, received or stored by electronic means and includes: (a) voice, where the voice is used in an automated transaction; and (b) a stored record.

It needs also to be noted that the Bill proposes the amendment of the term “data message”.

<sup>67</sup> Snail op cit at 43.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid; Clause 9 of the Bill seeks to amend section 11 where section 11(3) would be split and drafted in simple and plain language.

<sup>72</sup> As stated above, the ECT Act has adopted the functional equivalence approach which is enunciated in the UNCITRAL Model Law on Electronic Commerce, 1996. For instance, with regard to “Writing”, article 6 of the Model Law provides that: “(1) where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent references. (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing”.

With regard to signatures, section 13 of the ECT Act provides the solution on the legality of electronic signatures and advanced electronic signatures. For instance, section 13(1) provides that where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.<sup>73</sup> The above provisions relating to writing and signatures therefore mean that the e-consumer will be bound by his or her electronic communications with online retailers. This will even be the case where an electronic signature has not been used at all, but the e-consumer has expressed an intention to be bound by the contract.<sup>74</sup> An example of this would be in a click-wrap agreement where online consumers visit a website and then expresses the intent to enter into a valid purchase agreement by clicking a mouse on a specific area on the screen.<sup>75</sup>

In *Sihlali v SA Broadcasting Corporation Ltd*<sup>76</sup> the court had to consider the issue of writing in relation to data messages. The court noted that the definition of a “data message” in section 1 of the ECT Act included communications and as such amounted to “writing” as described in section 12. In *Jafta v Ezemvelo KZN Wildlife*,<sup>77</sup> the court dealt with the issue of

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<sup>73</sup> s 13(2)-5 of the ECTA provides as follows regarding signatures:

“(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if—

(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.”

(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.

(5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that—

(a) it is in the form of a data message; or

(b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.”

<sup>74</sup> *Snail* op cit at 44.

<sup>75</sup> *Ibid.*

<sup>76</sup> [2010] 31 ILJ 1477 (LC) at para 18.

<sup>77</sup> [2008] JOL 22096 LC, at para 113.



e-mail and SMS with regard to the conclusion of an employment contract. The court found that an SMS is an effective mode of communication as an e-mail or written document.

Collier<sup>78</sup> argues that the decisions handed down by the courts when interpreting the ECT Act, show that our courts have reached a level of maturity with regard to electronic communications, and that the *Jafta v Ezemvelo KZN Wildlife* decision, in particular, needs to be welcomed as it will serve as a critical precedent to all when dealing with electronic communications of this nature. It is therefore my submission that question 3 of my research question, regarding the legality and enforceability of an e-commerce contract has further been answered by these two judgments when interpreting the ECT Act provisions regarding data messages.

It is necessary to note that in terms of the ECT Act, there are four instances where the use of electronic writing or signature would be invalid, namely:<sup>79</sup>

- concluding an agreement for the alienation (the disposal) of immovable property as provided for in the Alienation of Land Act 68 of 1981;
- an agreement for a long-term lease of immovable property in excess of 20 years, as provided for in the Alienation of Land Act;
- the execution of a bill of exchange as defined in the Bills of Exchange Act 7 of 1953; and
- the execution, retention and presentation of a will or codicil as defined in the Wills Act 34 of 1964.<sup>80</sup>

*c) Time when and place where the contract comes into effect*

Section 22(2) of the ECT Act regulates the times and place for the conclusion of electronic contracts. The section stipulates that an agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was

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<sup>78</sup> See Debbie Collier 'e-Mail and SMS contracts: Lessons from the Labour Court' 16 Part 1 *JBL* at 21.

<sup>79</sup> Snail op cit at 44.

<sup>80</sup> See Schedule 2 of the ECT Act read with section 4(4); Ibid. In his article, Snail discusses *Macdonald & others v The Master & others* 2002 (5) SA 64 (O) case, where the court used its power to condone a document intended to be a will in terms of section 2(3) of the Wills Act to allow a computer printout as an indication of the testator's last wishes. I agree with Snail's argument that Parliament needs to reconsider the law relating to the above excluded acts every five years in order to accommodate the ever changing times in South Africa.

received by the offeror. This provision is however, applicable where the parties have not expressly varied the rules of the ECT Act by means of a contract.<sup>81</sup>

*d) Click wrap, and web-wrap agreements*

Sections 22(1) and 24 of the ECT Act recognise the validity of click wrap and web-wrap agreements.<sup>82</sup> For instance section 22(1) states that an agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages and section 24 provides for “the valid expression of intent to make an offer or acceptance and provides that an expression of intent or other statement is not without legal force and effect merely on the grounds that it is in the form of a data message it is not evidenced by an electronic signature”.<sup>83</sup>

#### IV. SCOPE OF APPLICATION OF THE ECT ACT

Section 42(1) of the ECT Act states that the consumer protection provisions contained in Chapter VII apply only to electronic transactions. As stated above, Chapter VII only protects natural persons; extends application to foreign vendors or suppliers (section 47); there is no party autonomy (section 48); and complaints may be lodged with the National Consumer Commission (section 49).<sup>84</sup> Also contained in the Chapter VII are supplier duties, consumer rights and regulation of certain marketing activities.

As a reinforcement or strengthening mechanism, the Bill proposes to insert a provision in section 42(1) which stipulates that Chapter VII shall apply in addition to the provisions of any other national law, unless stated otherwise.<sup>85</sup>

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<sup>81</sup> See section 21 of the ECT Act; Snail op cit at 44.

<sup>82</sup> Snail op cit at 45, states that these contracts are by nature defined as contracts of adhesion. This is the case because contract negotiation is excluded as one simply and unilaterally declares his or her acceptance or else goes without.

<sup>83</sup> Ibid at 46. According to Snail, “section 24 of the ECTA strengthens the provisions of sections 11 and 22, and solidifies the legal effectiveness of data messages used in transactional communication”.

<sup>84</sup> See clause 25 of the Bill which seeks to delete section 49. It is therefore my understanding that an aggrieved online consumer will make use of the provisions of the CPA and lodge a complaint with the National Consumer Commission.

<sup>85</sup> Clause 21 of the Bill further proposes that section 42(3) be deleted. This is a provision which exempts the application of Chapter VII to a regulatory authority.

In order to clearly understand the field of application of the consumer protection provisions of Chapter VII, section 42 must be read together with the rest of the chapter which stipulates that the chapter on consumer protection applies to electronic transactions where one party is a consumer and the other is a service provider or supplier.<sup>86</sup> In this instance, the definitions of *consumer* and *electronic transaction* as defined section 1 of the ECT Act become relevant.

#### *Electronic transaction*

*Electronic transaction* is not defined in the ECT Act, and instead the term *transaction* is defined as a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services. When one interprets the provisions of the ECT Act, , it can be deduced that the type of protection that is provided applies to transactions that are wholly concluded by electronic means, as well as those where the transaction is concluded partly electronically and partly by non-electronic means.<sup>87</sup> This interpretation also finds support when looking at the definitions of “*electronic agent*, *electronic communication* or *electronic signature*”, where the term data is a common denominator, one could surmise that an electronic transaction includes a transaction where the use of data, or electronic representations of information is intrinsic to or is at least an element of the transaction”.<sup>88</sup> The term “*data*” as defined in section 1 refers to any electronic representations of information in any form.

#### *Consumer*

*Consumer* is defined in section of the ECT Act as “any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier”. This definition does not afford consumer protection remedies to all business-to-business (B2B) transactions where goods or services are supplied to juristic persons. It also does not apply to some business-to-consumer (B2C) transactions where the consumer is a natural person but not the end user of the goods or services, such as in instances where a vendor or hawker buys goods for the purpose of reselling to other consumers.<sup>89</sup>

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<sup>86</sup> Papadopoulos op cit at 65.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid at 66.

B2B and B2C transactions are to a certain extent regulated or protected by the CPA discussed below. For instance, the term “juristic person” has been given some wide meaning in the CPA and includes “a body corporate; partnership or association; or a trust as defined in the Trust Property Act 57 of 1988”, meaning that electronic transactions concluded by small or medium sized business or a partnership could be afforded protection under the CPA.<sup>90</sup>

The ECT Act also protects prospective online consumers, meaning that any natural person who browses the website with the intention of entering into an electronic transaction will also be protected in terms of Chapter VII of the ECT Act.<sup>91</sup> In line with the understanding that the ECT Act provides protection to online consumers who are natural persons, the discussion on the ECT Act centres on mostly on electronic transactions that are entered into by a consumer as a natural person as an end user of the goods or services. I must state that the ECT Act has shortcomings in that protection is only afforded to “consumers” who are “*natural persons*,” leaving out consumers who may be companies or close corporations or vendors who are not end users.<sup>92</sup> As articulated above, the Bill proposes that the ECT Act should apply to both natural and legal persons.

It is prudent to mention that many new definitions have been included in the Bill, and some existing definitions have been amended or deleted.<sup>93</sup> Several definitions refer to that term as defined in another Act, such as the CPA and the Electronic Communications Act,<sup>94</sup> reasons being to ensure flexibility, accuracy and consistency and to keep up with e-commerce developments in South Africa and abroad.<sup>95</sup> Some of the proposed new definitions include, “*commercial communication*”, “*commercial electronic transaction*”, “*consideration*”, “*cybercrime*” “*electronic transactions*”, which includes commercial and non-commercial transactions, “*electronic communications*”, “*person*” which refers to a natural and juristic

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<sup>90</sup> Ibid at 66. Application is subject to the annual turnover not exceeding R2 million.

<sup>91</sup> Ibid.

<sup>92</sup> See Juana Coetzee ‘Electronic Communications and Transactions Act 25 of 2002: Facilitating Electronic Commerce’ (2004) 3 *STELL LR* at 510.

<sup>93</sup> Such as the terms, “*transaction*” and “*Consumer Affairs Committee*”.

<sup>94</sup> 36 of 2006.

<sup>95</sup> See Explanatory Memorandum on the Objects of the Bill, Chapter 1: Interpretation, Objects and Application at 37.

persons, “*supplier*” (which shall have the same meaning given in the CPA), and “*unsolicited communication*”.<sup>96</sup>

I commend the Department of Communications for attempting to insert new or amend fundamental definitions which have for more than a decade been posing interpretation and implementation problems for the ECT Act, particularly those mentioned above.

Some of the definitions where amendments are proposed include, “*consumer*” and “*electronic communication*”, which shall have the same meaning given to them in the CPA, “*data message*”, “*electronic signature*”, “*internet*”, “*personal information*” and *web page*.<sup>97</sup>

#### *The duties of the supplier (web trader)*

The ECT Act contains four main duties for the supplier or website owner who offers goods for sale, hire or exchange by means of an electronic transaction, as a means of protecting the online consumer.<sup>98</sup> These duties are:

- a) disclosure of listed information to online consumers (section 43(1)(a) – (r));
- b) providing an opportunity for the consumer to review, correct and withdraw from the electronic transaction (section 43(2));
- c) providing the consumer with a payment system that is secure (section 43(5));
- d) executing the order within 30 days of receiving the order unless agreed otherwise (section 46(1)-(3)).

Some of the duties are discussed below including the relevant remedies that are available to the consumer in case the supplier fails to comply. In this regard the duties of the supplier addresses all the research (except questions 3 and 8), with regard to issues such as ensuring safety and privacy when transacting online,<sup>99</sup> delivering the goods or rendering the service

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<sup>96</sup> Ibid; See also “Electronic signature” which has been defined in a much more clearer and encompassing manner which is “a sound, symbol or process that is (i) uniquely linked to the signatory; (ii) capable of identifying the signatory; (iii) created using means that the signatory can maintain and which are under his control; (iv) linked to the data to which it relates in such a manner that any subsequent change of the data can be detected and (v) intended by the user to serve as a signature.”

<sup>97</sup> Ibid.

<sup>98</sup> Papadopoulos op cit at 77.

<sup>99</sup> See for instance section 43(1)(p) of the ECT Act.

within 30 days of the order and trust by the supplier, which is an illustration that the online consumer can be confident that the supplier will adhere to the duties imposed by the ECT Act.

## V. KEY PROVISIONS OF CHAPTER VII OF THE ECT ACT

### *Cooling-off period*

Section 44 deals with cooling-off period and provides that a consumer is entitled to cancel without reason and without penalty any transaction for the supply of goods within seven days after the date of the receipt of the goods; or within seven days after the date of the conclusion of the agreement in the case of services that were rendered by a supplier. The only charge that may be levied by the supplier on the consumer is the direct cost of returning the goods. If payment for the goods or services has been effected prior to a consumer exercising a right within the stipulated period, the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.<sup>100</sup>

It is also important to note that the consumer's right to a cooling off period does not apply all electronic transactions, and online consumers need to be aware of these exclusions, prior to concluding an online transaction. Section 44 therefore does not apply to some of the following online transactions:<sup>101</sup>

- (a) for financial services including investment services, insurance and banking services;
- (b) by way of an auction;
- (c) for the supply of foodstuffs and other household goods;
- (d) where the price for the supply of goods or services is dependent on fluctuations in the financial markets and where the supplier has no control;
- (e) where the goods are made to the consumer's specifications, personalised, cannot be returned or are likely to expire quickly; and
- (f) where audio or video recordings or computer software were unsealed by the consumer.

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<sup>100</sup> Section 44(4) of the ECT Act stipulates that the consumer may not be prejudiced and may exercise rights provided for in any other law.

<sup>101</sup> s 42(2).

It is also important to note that Chapter VII does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions.<sup>102</sup>

*Minimum information that must be provided by the supplier on the website*

In accordance with the provisions of the European Distance Selling Directive discussed above, section 43(1) places an obligation on a supplier of goods or services to make the following information available to consumers on the web site where such goods or services are offered, namely:

(a) contact details and legal status of the supplier; (b) code of conduct to which that supplier subscribes and how can the consumer access such a code; (c) address where the supplier will receive legal processes; (d) full price and sufficient description of the characteristics of the goods or services offered by that supplier in order for the consumer to make an informed decision; (e) method of payment; (f) supplier's return, exchange and refund policy; (h) any alternative dispute resolution mechanism; (g) security procedures and privacy policy of the supplier in respect of payment and personal information and (i) the consumer's right to cooling off.<sup>103</sup>

The information listed above must be made available by the supplier to consumers where goods or services are offered to consumers. Of particular significance about the section 43 consumer protection safeguard is also section 43(2) where the supplier has a further obligation to provide a consumer with an opportunity:

- (a) to review the entire electronic transaction;
- (b) to correct any mistakes; and
- (c) to withdraw from the transaction, before finally placing any order.

An online retailer or supplier that has a website that does not conform to the mandatory requirements will be violating the ECT Act. Section 43(3) however, provides the consumer with a remedy that, should the supplier fail to comply with the provisions of subsection (1) or (2). Section 43(2) therefore addresses question 7, dealing with recourse that the consumer may have against the supplier in the event of breach of section 43. The consumer may cancel

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<sup>102</sup> s 42(3). It is important to mention that the Bill proposes a deletion of this section.

<sup>103</sup> See section 43(1) (a)-(r) for the exhaustive list of all information that must be provided by the web trader.

the transaction within 14 days of receiving the goods or services under the transaction. In the event where the consumer cancels the transaction, he or she must return the performance of the supplier or, where applicable, cease using the services performed; and the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.

I am of the opinion that the above consumer protection safeguards are necessary in protecting an online consumer who may be disadvantaged, compared to a consumer who shops in a real or physical shop. I concur with Jacobs' argument<sup>104</sup> that the only challenge is that section 43 is silent on how the supplier should make the information available to consumers who visit the website. Jacobs<sup>105</sup> argues further that there is also a corresponding duty on the consumer to furnish his details to the supplier for purposes of screening the consumer's credit record and to ensure that the consumer's information is easily available in the event a refund has to be made.<sup>106</sup> This is another shortcoming which the ECT Act does not cover. Unfortunately, the Bill does not seek to address this shortcoming, since only section 43(4)(a) would be amended.<sup>107</sup>

#### *Secure payment system*

The conducting of a transaction via the internet or electronic medium is by its very nature, very risky, due to the fact that a consumer is required to provide personal information to a system that is independently operated by the supplier, which system could be manipulated by criminal elements through fraud and cybercrime.<sup>108</sup> Payment for goods or services through the World Wide Web is often made by means of electronic fund transfer (EFT) or credit card, and these methods are prone to be affected by hacking, phishing, identity theft or fraud.

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<sup>104</sup> Wenette Jacobs 'The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts' (2004) 6 *SA Mercantile Law Journal* at 561.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> This section would read as follows, "the consumer must return any goods delivered or other performance of the supplier..."

<sup>108</sup> See Murdock Watney 'Cybercrime and the Investigation of cybercrime' In S Papadopoulos and S Snail (ed.s) *Cyberlaw@SA III* (2012, Van Schaik) 336, wherein "Cybercrime" is defined therein, as any unlawful conduct involving a computer or network, irrespective of whether it is the object of the crime (such as denial of service attack) or instrumental in the commission of the crime. Many of the traditional crimes such as fraud or extortion are now committed very faster and in some instances with very serious and disastrous consequences.)



When drafting the ECT Act, Parliament was aware of the inherent risks associated with making payment via the internet and included section 43(5) which places a duty on the supplier to utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned. The supplier is liable for any damage suffered by a consumer due to a failure by the supplier to comply with the provisions of the ECT Act, requiring payment system that is safe and secure.<sup>109</sup> As stated above, section 43(5) addresses question 1, by clarifying that online shopping is reasonably safer, particularly if the supplier complies with the obligation to provide a secure payment system and the consumer on the other makes payment responsibly, by taking care as not to divulge his or her personal information such as credit card details and identity number.

It is my submission that the principles enunciated in the OECD Guidelines on Consumer Protection, discussed above, were taken into account during drafting of the ECT Act and the Guidelines make provision for “limitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce”.<sup>110</sup>

#### *Performance by the supplier*

With regard to performance in terms of the contract that has been concluded by the consumer and the supplier, the supplier has a duty to execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise. Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days' written notice. In circumstances where the supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.<sup>111</sup> It is therefore pertinent to mention that section 46 of the ECT Act addresses question 5 posed above regarding the duties of the

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<sup>109</sup> s 43(6).

<sup>110</sup> See notes 11- 13 supra.

<sup>111</sup> s 46(1)-(3).

supplier to perform by delivering the goods or render a service to the online consumer, and this section ensures legal certainty and confidence in e-commerce.<sup>112</sup>

I must however, mention that clause 24 of Bill proposes to amend section 46(1)-(3), with substantial changes that would require the supplier to execute the electronic transaction<sup>113</sup> within 30 days after the day on which the transaction was entered into. Another consumer protection safeguard would be available to the online consumer, since in addition to cancelling the contract, “the consumer shall be entitled to a full refund of any prior payment, which refund must be made within 30 days of the date of cancellation.”<sup>114</sup>

#### *Application to foreign vendors or suppliers*

By including the provisions of sections 47 and 90 of the ECT Act, I am addressing question 4, dealing with jurisdiction in the event of a dispute between the consumer and the supplier. Section 47 of the ECT Act recognises the application of foreign law to electronic transactions conducted between a consumer and a vendor or supplier and declares that the protection provided to consumers in Chapter VII, applies irrespective of the legal system applicable to the agreement in question.<sup>115</sup> This section is, however, silent on what will happen in instances where another legal system that does not afford this type of protection governs the contract.<sup>116</sup> It was necessary for the ECT Act to spell out how protection will be enforced under a completely different legal system.<sup>117</sup> The Bill does not address this matter either.

It is critical to note that section 90 which deals with jurisdiction of the courts mentions four instances in terms of which a South African court would have jurisdiction in trying a case under the ECT Act. Section 90 provides that a court in the Republic trying an offence in terms of this Act has jurisdiction where:

- (a) the offence was committed in the Republic;
- (b) any act of preparation towards the offence or any part of the offence was committed in the Republic, or where any result of the offence has had an effect in the Republic;

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<sup>112</sup> See section 2 regarding objectives of the ECT Act.

<sup>113</sup> See clause 24, amendment of section 46(1). The word “order” would be deleted and replaced with “electronic transaction”.

<sup>114</sup> See clause 24, amendment of section 46(2).

<sup>115</sup> s 47.

<sup>116</sup> Coetzee op cit at 510.

<sup>117</sup> Ibid.

- (c) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic; or
- (d) the offence was committed on board any ship or aircraft registered in the Republic or on a voyage or flight to or from the Republic at the time that the offence was committed.

In Chapter 1, I indicated that I will discuss various remedies including criminal remedies that may be available to an online consumer in the case of failure by the supplier to comply with the legislative provisions regarding online consumer protection (addresses question 7). It is therefore my submission that section 90 affirms that any South African court trying an offence in terms of the ECT Act will have criminal jurisdiction, whether or not the offence was committed in another jurisdiction or on South African soil. There must however, be a nexus between the offence that was committed and the Republic, for instance, any act of preparation towards the offence or any part of it was committed in the Republic or the offence was committed by a person carrying on business in the Republic.

For instance, this means that a South African court can find criminal jurisdiction over Kalahari (discussed in Chapter 1) in instances where an online consumer alleges that Kalahari, an organisation that carries on business in South Africa has committed an offence relating to e-commerce transaction, such as credit card fraud. The online consumer can then open a criminal case against Kalahari as a supplier. Another example could be found in section 45(4) of the ECTA where a consumer who receives unsolicited commercial communications from a supplier can open a criminal case and the supplier may be convicted of a crime and be liable to a penalty of a fine or imprisonment not exceeding a year.

## VI. ENFORCEMENT OF CHAPTER VII OF THE ECT ACT<sup>118</sup>

Government's inclination to further protect the consumer is recognised in section 48, dealing with no party autonomy. A non-exclusion clause has been incorporated which states that any provision in an agreement which excludes any rights provided for in Chapter VII is null and void. This therefore means that suppliers cannot contract out of the consumer protection provisions offered in Chapter VII of the ECT Act.

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<sup>118</sup> ss 47-49.

The other enforcement mechanism provided by is outlined in Chapter VII of the ECT Act, where the consumer may lodge a complaint with the National Consumer Commission,<sup>119</sup> established in terms of the Consumer Protection Act, in respect of any non-compliance with the provisions of this chapter by a supplier; and where a supplier who sends unsolicited commercial communications to a consumer may be convicted of a crime and liable on conviction to a penalty of a fine or imprisonment not exceeding a year. This then means that the enforcement mechanism of the ECT Act addresses question 4 and 7 of my research regarding jurisdiction and empowering the consumer with administrative and criminal remedies in the case of non-compliance with the law by the supplier.

It is important to mention that the Bill proposes that section 89 dealing with penalties be deleted.<sup>120</sup> Instead the Bill introduces an offence and a penalty in the relevant section, such as section 45, 86, 87 and 88.<sup>121</sup>

## VII. UNSOLICITED GOODS OR SERVICES OR COMMUNICATIONS

As stated above, section 45 of the ECT Act dealing with the sending of unsolicited commercial communications (spam) will be repealed when the POPI Act, fully comes into operation.<sup>122</sup> This therefore means that the provisions of section 45 of the ECT Act are still in force. I mentioned earlier in this chapter that the Bill has inserted a definition of unsolicited communication, which some commentators on the field of e-commerce law have long stated that this term must be defined.<sup>123</sup> The Bill proposes that “*unsolicited communication*” shall, in relation to a data message regarding goods or services, mean that the data message has been transmitted to a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that data message.”

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<sup>119</sup> See Schedule 1, Part B par. 15 amended Section 1 of the ECT Act.

<sup>120</sup> See clause 59 of the Bill.

<sup>121</sup> See clauses 48- 50 of the Bill.

<sup>122</sup> For instance, see discussion by Michalson *supra* which indicates that not all provisions of the POPI Act are operational; Also see <http://www.ensafrica.com/news/limited-sections-of-POPI-have-commenced?Id=1405&STitle=TMT%20newsflash>, accessed on 3 September 2014.

<sup>123</sup> See Lance Michalson “The law vs the scourge of spam” September 2003 available at <<http://michalsons.co.za/the-law-vs-the-scourge-of-spam/1019>>, accessed on 21 August 2014.

The Bill seeks to render the sending of unsolicited communications, unlawful and therefore a criminal offence. Clause 23 of the Bill which seeks to amend section 45 of the ECT Act provides no person may send unsolicited communications without the consumer's consent. Any person who fails to comply with the prohibition is guilty of an offence and liable on conviction to a fine not exceeding R1 million or imprisonment not exceeding 1 year.

It would appear that the Bill is contradicting the POPI Act, in that the latter provides that section 45 will be repealed, meanwhile the Bill seeks to amend the very same section 45. Michalson, however, clarifies the matter where he states that if the POPI Act comes into operation before the amendment Bill, section 45 will be repealed.<sup>124</sup> If the POPI Act comes into operation after the amendment, then the amended section 45 will apply from the amendment date until it is repealed by the POPI Act.<sup>125</sup>

#### VIII. SUMMARY AND SPECIFIC EXCLUSIONS<sup>126</sup>

Generally, the ECT Act applies to all electronic transactions and data messages, but does not apply to those excluded by the Act itself in section 4<sup>127</sup> or Schedule 1 or 2.<sup>128</sup> Further, as noted in the discussion above, section 42(3) limits the scope of the provisions of Chapter VII, in that the latter "does not apply to a regulatory authority established in terms of a law if that

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<sup>124</sup> <http://www.michalsons.co.za/ect-amendment-bill/11380>, accessed on 3 September 2014.

<sup>125</sup> Ibid.

<sup>126</sup> Papadopoulos op cit at 66.

<sup>127</sup> Section 4 of the ECT Act provides that:

- (1) Subject to any contrary provision in this section, this Act applies in respect of any electronic transaction or data message.
- (2) This Act must not be construed as—
  - (a) requiring any person to generate, communicate, produce, process, send, receive, record, retain, store or display any information, document or signature by or in electronic form; or
  - (b) prohibiting a person from establishing requirements in respect of the manner in which that person will accept data messages.
- (3) The sections of this Act mentioned in Column B of Schedule 1 do not apply to the laws mentioned in Column A of that Schedule.
- (4) This Act must not be construed as giving validity to any transaction mentioned in Schedule 2.
- (5) This Act does not limit the operation of any law that expressly authorises, prohibits or regulates the use of data messages, including any requirement by or under a law for information to be posted or displayed in a specified manner, or for any information or document to be transmitted by a specified method.

<sup>128</sup> Papadopoulos op cit at 66.

law prescribes consumer protection provisions in respect of electronic transactions”. It has also been highlighted above that, the consumer protection provisions of the ECT Act apply “to commercial or non-commercial transactions that are concluded between a supplier and a natural person consumer, who is also the end-user of the goods and services”.<sup>129</sup> The protection to the online consumer should be therefore be invoked in the following in two instances: (a) when an electronic transaction is concluded partly or completely through the exchange of data or electronic representations of information and (b) where a prospective consumer wishes to enter into an electronic transaction.<sup>130</sup> In my analysis, I was able to address all the sub-questions that are linked to dissertation topic, and also highlighted how the Bill seeks to cure some of defects that are prevalent in the ECT Act.

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

## CHAPTER 3

### ANALYSIS OF THE CONSUMER PROTECTION ACT, 68 OF 2008

#### I. GENERAL PREMISE

In this Chapter and within the context of the CPA, I address all the research questions posed in Chapter 1.<sup>131</sup> Question 8 is immediately addressed by virtue of this discussion of the CPA in this chapter, since the mere existence of the CPA illustrates that e-commerce is regulated in terms of our South African legislation.

The CPA, which is one of the most progressive pieces of legislation to be passed by Parliament, was assented to by the President on 24 April 2009. Chapters I and V came into operation on 29 April 2009 whilst the rest of the chapters came into effect on 1 April 2011. The purpose and policy of the CPA is clearly set out in the Act and it aims to promote and advance the social and economic welfare of consumers in South Africa by amongst other things: (a) establishing a legal framework and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) promoting fair business practices; (c) protecting consumers from unconscionable, unfair, unreasonable, unjust, deceptive, misleading, unfair or fraudulent conduct; (d) improving consumer awareness; (e) promoting consumer confidence through education and empowerment; providing for an accessible and efficient system of consensual resolution of disputes; and (f) providing for an effective and efficient system of redress for consumers.<sup>132</sup>

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<sup>131</sup> For ease of reference, these questions are: whether it is safe to transact online; will the online consumer's information and privacy be protected; will a contract concluded by means of a data message be legal and enforceable; which various forums can an online consumer approach to hear the matter in case of a dispute; is there any obligation on the service provider to deliver once the electronic transaction has been concluded; can the supplier be trusted in honouring the obligations of the e-commerce contract; and what legal recourse will be available to the online consumer in the event the supplier fails to honour the obligations or in case the consumer is not satisfied with the goods purchased or services rendered.

<sup>132</sup> s 3(a)-(h) of the CPA.

The CPA presents several fundamental consumer rights<sup>133</sup> that may be enforced by the consumer by either referring a dispute to the Tribunal;<sup>134</sup> or to a provincial consumer court (section 69(c)(i)-(iii)); or by lodging a complaint with the National Consumer Commission (the Commission, established in terms section 85); and thereafter to the courts (in terms of section 69(d)).<sup>135</sup>

Chapter 2 of the CPA contains nine consumer rights, namely:

- a) Right to equality in the consumer market;
- b) Right to privacy;
- c) Right to choose;
- d) Right to disclosure and information;
- e) Right to fair and responsible marketing;
- f) Right to fair and honest dealing;
- g) Right to fair, just and reasonable terms and conditions;
- h) Right to fair value, good quality and safety; and
- i) Supplier's accountability to consumers.

Any of the following persons listed in the Act may approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring.<sup>136</sup> In this manner, the complainant will ensure that his or her consumer rights are realised and protected.

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<sup>133</sup> Chapter II, parts A-I, section 8-67 of the CPA.

<sup>134</sup> In terms of section 69(a) of the CPA when permitted. Tribunal means the National Consumer Tribunal established in terms of section 26 of the National Credit Act.

<sup>135</sup> Papadopoulos op cit at 67.

<sup>136</sup> In terms of section 4(1), the persons who may seek relief in terms of the Act are: An individual; an authorised person acting on behalf of another; a person acting as a member or in the interest of affected group or class; a person acting in the public interest such as an *amicus curiae*, with leave of tribunal or the court and association acting in the interests of its members.<sup>136</sup> The persons who may seek relief in terms of the Act are: An individual; an authorised person acting on behalf of another; a person acting as a member or in the interest of affected group or class; a person acting in the public interest such as an *amicus curiae*, with leave of tribunal or the court and association acting in the interests of its members.



Generally, the extent of protection provided by the CPA to an aggrieved online consumer includes a court order in terms of which the supplier may be ordered to alter or discontinue any offending conduct; awarding of damages; offender liability for severe fines or imprisonment not exceeding 10 years or to both a fine and imprisonment. Further, administrative fines may also be imposed by the Tribunal.<sup>137</sup>

As will be observed from the detailed exposition of the CPA below, the provisions of the CPA adequately address most of the questions posed above, and some of the relevant provisions are contained in the overarching Chapter 2 of the CPA, which contains the rights that online consumers have, such as, the right against unfair discrimination; privacy right; rights to fair and honest dealing and reasonable terms by the supplier, (which addresses the question on whether the supplier could be trusted) and the supplier's duty to account to consumers. On the other hand, the CPA empowers the consumer to assert his or her rights by referring a dispute to the Tribunal, Commission and the courts of law.

## II. FIELD OF APPLICATION AND SPECIFIC EXCLUSIONS

According to section 5(1), the CPA applies to all transactions occurring within the Republic; the promotion or supply of any goods and services occurring within the Republic; goods or services that are supplied or performed in terms of a transaction to which the CPA applies; exempted goods, but to which sections 60 and 61 are applicable.<sup>138</sup> Juristic persons that supply goods or services in the Republic and the transactions that they enter into with consumers will fall within the ambit of the CPA, including small and medium enterprises whose annual turnover does not exceed R2 million.<sup>139</sup>

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<sup>137</sup> See ss 76, 111 and 112; Papadopoulos op cit at 67.

<sup>138</sup> s 5(1).

<sup>139</sup> See Determination of Threshold in terms of the Consumer Protection Act 68 of 2008 (Government Gazette No. 34181, Government Notice No. 294 of 1 April 2011. In terms of section 5(5) the CPA, however, does not apply to transactions where:

- (a) goods or services are promoted or supplied to the State;
- (b) the consumer is a juristic person where the annual turnover exceeds the amount determined by the Minister from time (currently R2 million);
- (c) industry-wide exemption granted to regulatory authority by the Minister; credit agreements under the national Credit Act but not to the goods or services that are the subject of the credit agreement; sservices rendered under an employment contract;

In terms of section 5(8), the application of the CPA extends to a matter irrespective of whether the supplier:

- (a) resides or has its principal office within or outside the Republic;
- (b) operates on a for profit basis or otherwise; or
- (c) is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or
- (d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

Similar to the ECT Act, section 48(1)(c) of the CPA recognises that there is no party autonomy and that a supplier must not require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction. This section is therefore aimed at shielding the consumer against unfair, unreasonable or unjust contract terms.

In a nutshell, the CPA applies to all persons and all transactions occurring in South Africa; it regulates the marketing of goods or services and transactions and agreements entered into between producers, suppliers, retailers, service providers; importers and other intermediaries and the consumer.<sup>140</sup> It also applies to franchisors and franchisees. The CPA however, does not apply to pre-existing transactions and agreements except to the limited extent set out in item 3 of Schedule 2 of the Act. The main commercial activities that are involved are “*transactions*” and “*marketing*” of “*goods*” or “*services*” between a “*supplier*” or “*service provider*” and a “*consumer*”, hence some of the terms are defined below.<sup>141</sup>

#### *Application of the CPA to pre-existing agreements.*

The CPA commenced on 31 March 2011 and does not have retrospective application. Item 3 of Schedule 2 of the CPA determines the extent to which the CPA applies to “*pre-existing*

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- (d) agreements giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (LRA); and

- (e) agreements giving effect to a collective bargaining agreement as defined in section 213 of the LRA.

<sup>140</sup> Papadopoulos op cit at 67.

<sup>141</sup> Ibid.

*transactions and agreements*” and that the CPA does not apply to any transaction concluded, or agreement entered into, before the general effective date; or any goods supplied or services provided to a consumer before the general effective date.

This principle was confirmed in *Quality Vacation Club v The National Consumer Commission*.<sup>142</sup> In this case, the Applicant brought an application to the National Consumer Tribunal (the Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA.

A complaint was lodged by Mrs N Luthuli (the complainant) with the Respondent (the Commission) on the 11<sup>th</sup> of May 2011 against the Applicant in respect of a time share contract that was concluded on 5 August 2010.

The Tribunal found that since the general effective date of the CPA was 31 March 2011, the CPA was not applicable to the matter, as the agreement was entered into prior to the general effective date of the CPA. The Tribunal concluded that the compliance notice issued by the Respondent was not issued in accordance with the provisions of the CPA, and was therefore cancelled by the Tribunal. The *Quality Vacation Club* judgment therefore provides a clear position that online consumers need to be aware that not all online consumer disputes or agreements will be covered by the CPA, as the general effective date will be the determining factor on whether the relevant dispute resolution forum will have jurisdiction to hear the dispute. Suffice to mention that the preceding discussion on pre-existing agreements addresses question 4 of the research dealing with jurisdiction.

#### *Definition of specific terms*

In terms of section 1 of the CPA, the term “*consumer*”, means (a) a person to whom goods or services are marketed in the ordinary course of the supplier’s business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business; (c) a user recipient or beneficiary of those goods or services irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular

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<sup>142</sup> Case No: NCT/5078/2012/60(3) & 101(1) (P).

goods or services; and a (d) franchisee. A consumer includes both a natural and juristic person whose annual turnover at the time of the transaction does not exceed R2million.

A “*supplier*” means a person who markets any goods or services; meanwhile a “*service provider*” means a person who promotes, supplies or offers to supply any service.

The CPA defines a “*transaction*” in respect of a person acting in the ordinary course of business which is an agreement between two or more persons:

- (a) for the supply or potential supply of any goods or services in exchange for consideration;
- (b) for the supply by that person of any goods to or at the direction of a consumer for consideration;
- (c) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.

Consideration is anything of value, given and accepted, in exchange for the goods or services.<sup>143</sup> According to Papadopoulos,<sup>144</sup> with regard to an online consumer, a consideration would include electronic credit, tokens and tickets, money, property, awards, undertakings, loyalty credit and rights to assert a claim.

### III. KEY PROVISIONS OF THE CPA

#### *Interpretation of the CPA with regard to signatures, business days and inconsistency*

The CPA recognises the importance of using electronic signatures in transactions and section 2 states that if a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including the use of an electronic and advanced electronic signature, as defined in the ECT Act. It is my submission that this provision of the CPA answers question 2 of my research and reaffirms the legal position (that was also discussed in Chapter 2, under ECT Act above) that e-commerce contracts are legally enforceable, even if the online consumer signed the document by means of an electronic or advanced electronic signature.

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<sup>143</sup> s 1 of the CPA.

<sup>144</sup> Op cit at 68.

Business days are recognised for the performance transactions in terms of the Act, instead of calendar days, and in this instance business days are calculated by excluding the first day and including the last and also excluding public holidays, Saturdays and Sundays.<sup>145</sup>

### *Equality and protection against discriminatory marketing*

Section 8 of the CPA asserts the entrenched right to equality as contained in the Constitution by providing that the supplier, must not exclude or grant exclusive access to any goods or services; assign priority of supply of goods or services; supply a different quality of goods or services or charge different prices to any person or different categories of consumers. The supplier is also prohibited from targeting particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or even excluding a particular community, district, population or market segment from the supply of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination listed in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act. In the event of any contravention of the above, by the supplier, the matter will be forwarded to the equality court for adjudication in terms of section 10 of the Act.<sup>146</sup> Here question 4 of the research regarding jurisdiction of the equality court is being addressed.

### *Supplier prohibitions*

The CPA contains the following supplier prohibitions and duties which are applicable to online transactions, some of which are discussed in detail below. The discussion on supplier

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<sup>145</sup> s 1(6)(a)-(c); See also section 1(8)-(9) which provides that if there is an inconsistency between any provision of this Act and a provision of any Act, the provisions of both Acts apply concurrently, as both Acts must be reconciled where possible. If it is not possible to reconcile them, the provision that extends the greater protection to a consumer prevails over the alternative provision. No provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.

<sup>146</sup> Section 10 of the CPA deals with Equality court jurisdiction over Part A of Chapter 2 and provides that:

(1) In respect of an alleged contravention of this Part, an accredited consumer protection group, or any person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, may either—

(a) institute proceedings before an equality court in terms of Chapter 4 of that Act; or

(b) file a complaint with the Commission, which must refer the complaint to the equality court, if the complaint appears to be valid.

prohibitions and duties therefore addresses questions 5 and 6, namely: obligations imposed on the supplier and whether the supplier can be trusted to deliver on the contract.<sup>147</sup> Suppliers and service providers must not:<sup>148</sup>

- a) discriminate directly or indirectly or give any person or group preferential treatment unless such discrimination is fair or based on reasonable grounds;<sup>149</sup>
- b) under the right to privacy, engage in any unwanted direct marketing, during the prohibited times on which consumers can be contacted at home;<sup>150</sup>
- c) under bait marketing, advertise goods or services as being available at a specified price in a manner that may mislead or deceive consumers;<sup>151</sup>
- d) engage in negative option marketing, by inducing a person to enter into or modify an agreement on the basis that the goods will be supplied or the agreement will automatically come into existence;<sup>152</sup>
- e) under the right to choice, exceed the regulated time period for fixed term agreements or deprive a consumer of the right to terminate a contract earlier than initially agreed;<sup>153</sup>
- f) pretend that a person has won a competition, if no competition has been conducted;<sup>154</sup>

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<sup>147</sup> With regard to the online consumer trusting the supplier to deliver on the electronic transaction, section 44(1), titled “Consumer’s right to assume supplier is entitled to sell goods”, reiterates the legal position by providing that:

“44. (1) Subject to subsection (2), every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that—

(a) in the case of a supply of goods, the supplier has the legal right, or the authority of the legal owner, to supply those goods;

(b) in the case of an agreement to supply goods, the supplier will have a legal right, or the authority of the legal owner, to—

(i) sell the goods at the time the title to those goods is to pass to the consumer; or

(ii) lease the goods at the time the lessee is to take possession of the leased goods.”

<sup>148</sup> Papadopoulos op cit at 80.

<sup>149</sup> ss 8 & 9 of the CPA.

<sup>150</sup> s11 & 9.

<sup>151</sup> s 30(1).

<sup>152</sup> s 31(1).

<sup>153</sup> s 14(1).

<sup>154</sup> s 36(2).

- g) under alternative work schemes, make a false representation with regard to the availability, profitability or risk of work or business in terms of which a person is solicited or invited to conduct business or work from his or her home;<sup>155</sup>
- h) under referral selling, promote, offer or supply goods or services on the condition that the consumer will receive a commission or other benefit upon giving the supplier names of other consumers or assist the supplier in supplying goods or services to others;<sup>156</sup>
- i) contract with, or knowingly enter into a contract with mentally unfit persons or persons without legal capacity;<sup>157</sup>
- j) under the right to fair and honest dealing, use physical force, coercion, undue influence or unfair tactics when marketing goods or services to a consumer or take advantage of illiterate or mentally or physically disabled consumers, since such behaviour constitutes unconscionable conduct;<sup>158</sup>
- k) Under the right to unfair or unjust contract terms, require consumers to waive their rights, or supply goods or services at a price that is unfair or unreasonable, including requiring the consumer to waive supplier liability;<sup>159</sup> and
- l) supply unsafe, hazardous or defective goods.<sup>160</sup>

#### *Supplier duties*

The supplier also has the following obligations under the CPA (list not exhaustive):<sup>161</sup>

- (a) providing the consumer with prescribed notices, documents or visual representation in plain language;<sup>162</sup>

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<sup>155</sup> s 37(1).

<sup>156</sup> s 38(1).

<sup>157</sup> s 39(1). This section also provides that an agreement entered into for the supply of any goods or services, to a consumer is void if the consumer has been declared mentally unfit by the court and the supplier knew, or could reasonably have determined, that the consumer was the subject of such a court order.

The agreement is voidable at the instance of the consumer, if at the time it was entered into: (i) the consumer was an unemancipated minor; (ii) was made without the consent of an adult responsible for that minor; and (iii) the agreement has not been ratified by the minor's legal guardian or by the consumer after being emancipated or becoming an adult.

<sup>158</sup> s 40 (1)-(2).

<sup>159</sup> s 48(1).

<sup>160</sup> s 61(1).

<sup>161</sup> Papadopoulos op cit at 81.

<sup>162</sup> s 22(1)-(2).

- (b) disclosing in a conspicuous notice that goods have been reconditioned, rebuilt or remade (the so-called grey market goods);<sup>163</sup>
- (c) providing the consumer with written records of transactions in respect of the goods that are being supplied;<sup>164</sup>
- (d) informing consumers of their right to cancel direct marketing agreements in the prescribed manner;<sup>165</sup>
- (e) warning the consumer of potential risks of an unusual character or risks which the consumer could not reasonably be expected to be aware of or that could result in serious injury or death;<sup>166</sup>
- (f) wearing or displaying a badge or similar identification when engaged in direct marketing, delivering goods, performing any services for the consumer or when calling on a consumer;<sup>167</sup>
- (g) taking care of and accounting for consumer's property under the supplier's control or custody and not treating that property as if the supplier were the owner thereof;<sup>168</sup>
- (h) providing quality service, with regard to timely performance, and delivering or installing goods that are free of defects;<sup>169</sup>
- (i) providing the consumer with safe and good quality goods that are suitable for their generally intended purpose;<sup>170</sup> and
- (j) informing a consumer of their right to cooling off after direct marketing without reason or penalty within five business days on which the agreement was concluded or the goods were delivered, as the case may be.<sup>171</sup>

#### *Pre-authorisation of repair or maintenance services*<sup>172</sup>

The CPA requires the supplier to provide the consumer with an estimate or quotation. This applies only, with regard to a transaction or consumer agreement with a price value above the

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<sup>163</sup> s 25(1).

<sup>164</sup> ss 26(2) & 50(1).

<sup>165</sup> s 32(1).

<sup>166</sup> s 58(1).

<sup>167</sup> s 28.

<sup>168</sup> s 65.

<sup>169</sup> s 64.

<sup>170</sup> s 55.

<sup>171</sup> ss 16 & 32.

<sup>172</sup> s 15(1)-(2).



threshold prescribed in terms of the Act and if, in terms of that transaction or agreement, a service provider supplies a repair or maintenance service to, or supplies or installs any replacement parts.

The supplier must not charge a consumer for the supply of any goods or services, unless the supplier has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or the consumer, in writing, or by another recorded manner has declined the offer of an estimate and authorised the work; or has pre-authorised any charges up to a specified maximum, and the amount charged does not exceed that maximum. As a general rule, preparation of the estimate by the supplier is free, unless the price for estimate was disclosed and consumer approved it.<sup>173</sup>

#### *Right to fair and responsible marketing*

The CPA sets general standards for the marketing of goods or services and also prohibits bait marketing in sections 29 and 30. Section 29 prohibits a supplier from marketing any goods or services in a manner that is reasonably likely to imply a false or misleading representation or in a manner that is misleading, fraudulent or deceptive in any way. This prohibition on deceptive marketing is in respect of the nature, properties, advantages or uses of the goods or services; the manner in or conditions on which those goods or services may be supplied; the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services.<sup>174</sup>

#### *Bait marketing (section 30)*

With regard to bait marketing, the CPA stipulates that the supplier must not advertise any particular goods or services alleging that they are available at a specified price in a manner

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<sup>173</sup> In terms of section 15(3)-(4), if a supplier has provided an estimate for any service, or goods and services, the supplier may not charge the consumer a price for that service, or those goods and services, that exceed the estimate, unless after providing the estimate the service provider has informed the consumer of the additional estimated charges, and the consumer has authorised the work to continue.

<sup>174</sup> s 29.

that may mislead or deceive consumers about the actual availability of those goods or services at the advertised price.<sup>175</sup>

#### *Referral selling (section 38)*

With regard to referral selling, section 38 of the CPA prohibits the promoting, offering or supplying of goods or services upon the condition that the consumer will refer others. It provides that a supplier must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if the consumer subsequently gives the supplier the names of consumers; or otherwise assists the supplier to supply goods or services to other consumers; and that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction. A statement by a consumer, whether in an agreement or otherwise, to the effect that the consumer was motivated to enter into a transaction predominately for the value of the goods or services, rather than for the rebate, commission or benefit, is not a defence to an allegation that a person has contravened the section.

#### *Negative option marketing (section 31)*

Section 31 prohibits negative option marketing by a supplier. It provides that supplier must not promote any goods or services; or induce a person to accept any goods or services or to enter into or modify such an agreement, on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer or inducement. An agreement purportedly entered into as a

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<sup>175</sup> In terms of section 30 of the CPA, if a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states that there is a limitation in respect of availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits, and honour those the advert with regard to the limit. The supplier may in circumstances where he failed to comply with the provisions of the Act, have a defence, if the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and the consumer unreasonably refused that offer; or accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

result of an offer or inducement or a modification of an agreement purportedly agreed to as a result of an offer or inducement is void.<sup>176</sup>

*Fair and honest dealing (section 40)*

The supplier must not use force, coercion, undue influence, pressure, duress, harassment or unfair tactics, when:

- (a) marketing any goods or services;
- (b) supplying goods or services to a consumer;
- (c) negotiating, concluding, or enforcing an agreement to supply any goods or services to a consumer;
- (d) demanding for, or collection of, payment for goods or services by a consumer; or
- (e) recovering goods from a consumer.

Further, in terms of this section, it is unconscionable conduct for a supplier, knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance or inability to understand the language of an agreement.

*Consumer's right to quality of service (section 54)*

The consumer has the right to demand from the supplier quality service and the supplier has a legal obligation to ensure: timely performance and completion of service; service that is of acceptable standards; the return of goods that are free of defects; the return of any property or vehicle of the consumer in a good condition as it was when the consumer made it available to the supplier for the purpose of performing such services; the installation of quality goods; goods that are usable and durable for reasonable period.

If a supplier fails to perform a service according to the required standards, the consumer may require the supplier to either remedy any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

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<sup>176</sup> s 31(1)-(3).

#### *Liability for damage caused by goods (section 61)*

Section 61 of the Act contains a strict liability provision and renders the supplier of any goods liable for any harm, caused wholly or partly as a consequence of –

- (a) supplying any unsafe goods;
- (b) a product failure, defect or hazard in any goods; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods; irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

As discussed above, the preceding discussion was addressing research questions 5 and 6, wherein some of the sections provide the consumer with immediate remedies, such as negative option marketing, where an agreement entered into as a result of an offer or the inducement of an agreement purportedly agreed to as a result of an offer or inducement is void.

#### IV. PROTECTION OF CONSUMER RIGHTS AND CONSUMERS' VOICE

Chapter III of the CPA titled "Protection of Consumer Rights and Consumers' Voice" deals with consumer's rights to be heard and obtain redress and the relevant sections therein include, protection of consumer rights;<sup>177</sup> enforcement of rights by consumer;<sup>178</sup> alternative dispute resolution and initiating complaint to the Commission or Tribunal, and approaching the court for redress.<sup>179</sup> This part of the analysis of the CPA addresses questions 4 and 7 posed above, namely, jurisdiction and legal recourse or any form of remedy that is available to a consumer in the event of defective service, or where the supplier has done what is prohibited by the CPA or has not complied with the prescribed obligations mentioned above.

#### *Protection of the rights of the consumer*

Section 68 protects the rights of a consumer where the consumer has exercised, asserted or sought to uphold any right set out in this Act or in an agreement or transaction with a

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<sup>177</sup> s 68.

<sup>178</sup> s 69.

<sup>179</sup> s 70.

supplier. The supplier must not, in those instances, respond by discriminating directly or indirectly against that consumer; penalise the consumer; or alter the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer; or take any action to enforce, suspend or terminate an agreement with the consumer.

Further, if an agreement or any provision of an agreement is, in terms of this Act, is declared to be void, or is severed from the agreement the supplier who is a party to that agreement must not, in response to that decision –

- (a) directly or indirectly penalise another party to that agreement;
- (b) alter the terms or conditions of any other transaction or agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or
- (c) take any action to accelerate, enforce, suspend or terminate another agreement with another party to the impugned agreement.

#### *Enforcement of rights by consumer (section 69)*

As stipulated above, a consumer or a person acting on behalf of the consumer is empowered to enforce his or her right in terms of the Act or in terms of a transaction or agreement, with regard to a dispute that he or she may have with the supplier by –

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not fall within the jurisdiction of the ombud, apply to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court
- (d) referring the matter to another alternative dispute resolution agent; or
- (e) filing a complaint with the Commission; and
- (f) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

It is clear that an aggrieved online consumer is empowered by the CPA to exhaust all remedies that are not expensive such as referring a dispute to the Tribunal, alternative dispute resolution agent or Commission, before resorting to litigation (which may be unaffordable for

an average consumer). It is my submission that section 69 clearly gives effect to our constitutional right of access to courts, independent or impartial tribunal as enunciated in section 34 of the Constitution.

*Alternative dispute resolution (section 70)*

In terms of section 70, an online consumer, who for instance, (a) bought reconditioned or grey market goods where the supplier failed to disclose such fact or (b) bought hazardous or defective goods, may seek to resolve any dispute in respect of a transaction or agreement with a supplier in four different ways, by referring the matter to:

- (a) an alternative dispute resolution agent who may be an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (b) an industry ombud;
- (c) a person or entity providing conciliation, mediation or arbitration services; or
- (d) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court.

In instances where alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process, the agent may terminate the process by notice to the parties, and the party who referred the matter to the agent may if he or she so desires, file a complaint with the Commission in accordance with section 71 of the Act.

Where the alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may record the resolution of that dispute in the form of an order, and with the consent of the parties to the dispute, submit it to the Tribunal or the High Court to be made a consent order. The CPA also makes provision for the award of damages and provides that, with the complainant's consent, a consent order that has been made an order of the Tribunal or the High Court may include an award of damages to that complainant.<sup>180</sup> Again, this is an indication of the effective legal remedies that are provided by the CPA.

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<sup>180</sup> s 70(1)-(4).

### *Reporting a complaint to the Commission and Establishment of the Commission*

As part of exhausting her legal remedies, the online consumer may file a complaint concerning a matter contemplated in the Act with the Commission in the prescribed manner and form, alleging that the supplier or service provider has acted in a manner inconsistent with the CPA. Further, the Commission is empowered to directly initiate a complaint concerning any alleged prohibited conduct on its own accord, or when directed to do so by the Minister; or on the request of a provincial consumer protection authority; another regulatory authority; or an accredited consumer protection group.<sup>181</sup>

It is important to mention that the Commission is a creature of statute which has been established in terms of section 85 of the CPA. It is a juristic person, which is an organ of state within the public administration.<sup>182</sup> The Commission has jurisdiction throughout the entire country and is required to exercise functions that are assigned to it in terms of the CPA or assigned to it by the Minister of Trade and Industry and such functions must be carried out in accordance with the values enunciated in section 195 of the Constitution.<sup>183</sup> This therefore means that an online consumer may approach the Commission with a complaint, irrespective of which part of the country the dispute arose. The Commissioner may in terms of the CPA appoint inspectors and investigators to conduct an investigation in terms of the CPA.<sup>184</sup>

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<sup>181</sup> s 71.

<sup>182</sup> See Chapter 3, Part B from sections 72 to 75 dealing with aspects such as investigation by the commission, outcome of the investigation, consent order and referral to Tribunal.

In terms of section 75 a complaint may be referred to the Tribunal:

(1) If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to –

(a) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

(b) the Tribunal, with leave of the Tribunal.

<sup>183</sup> s 85.

<sup>184</sup> See Part C of Chapter 5, sections 92 to 98. The Commission has the following functions:

(a) carrying out the functions and exercising powers assigned to it in terms of the Act or any national legislation; development of codes of practice;

(b) promotion of legislative reform; promotion of consumer protection within organs of state;

(c) conducting research in order to increase the knowledge of the nature and dynamics of the consumer market; liaising with other regulatory authorities; and

In terms of the Commission's Annual Report for the 2012/2013 Financial Year, the Enforcement and Investigations Division (EID) of the Commissions is mandated to ensure enforcement of the Act in terms of two mandates, namely Complaints Handling and Investigations.<sup>185</sup> However, the approved structure comprises of three Units, which are, Complaints Handling, Alternative Dispute Resolution (ADR) and Investigations. According to the Annual Report, 26 488 call centre enquiries were handled by the Commission and 9 518 complaints were received during the 2012/2013 Financial Year, illustrating the Commission is easily accessible to the general public.<sup>186</sup> The 9 518 complaints were received were by way of emails, walk-ins, post and via the call centre.<sup>187</sup> The Commission argues that there has been a steady increase in the number of walk-ins in the past year and that the growth can be attributed to more and more people becoming aware of the services offered by the Commission.<sup>188</sup>

#### *Redress by court (section 76)*

Section 76 deals with powers of court to enforce consumer rights and provides that a court considering a matter in terms of this Act may –

- (a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;
- (b) make any order specifically contemplated in this Act; and
- (c) award damages against a supplier for collective injury to all or a class of consumers generally.<sup>189</sup>

It is also important to note that the CPA does not deprive the consumer or supplier of any right to recover interest or special damages; or to recover money paid if the consideration for the payment of it has failed.<sup>190</sup>

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- (d) advising or making recommendations to the Minister on matters relating to consumer protection which includes the determination of norms and standards regarding consumer protection.

<sup>185</sup> See the Commission's Annual Report for 2012/2013 Financial Year at 21.

<sup>186</sup> Ibid at 25.

<sup>187</sup> Ibid.

<sup>188</sup> According to the Commission's Annual Report the Commission assisted thousands of consumers in the 2012/2013 financial year through its complaints handling processes. The total amount recovered for consumers as a result of the Commission's intervention was R20 288 524, 07.

<sup>189</sup> s 76(1).

<sup>190</sup> s 76(2).



### *Research and public information*

The inclusion of section 96 in the CPA which mandates the Commission to be the custodian of research and public information is commendable. In terms of this section, the Commission must:<sup>191</sup>

- (a) increase knowledge of the nature and dynamics of the consumer market, and promote public awareness of consumer protection matters as well as public awareness on the provisions of the Act;
- (b) provide guidance to the public by issuing explanatory notices outlining its working procedure and guidance on the interpretation of the Act;
- (c) apply to a court for a declaratory order on the interpretation or application of the Act; or
- (d) publish any orders and findings of the Tribunal or a court in case there was a breach of the Act.

## V. ENFORCEMENT OF THE CPA

In Chapter 1, I outlined that my scope of analysis of the various pieces of legislation delves into the different enforcement mechanisms, and in particular, the administrative, civil or criminal remedies that may be available to an online consumer in the case of non-compliance by suppliers with the statutes. Also mentioned for discussion above, was the issue of some of the provisions of the Acts that have been interpreted by the Commission, Tribunal and Courts (case law). The discussion on the CPA that follows therefore tends to address all the issues raised above, and at the same time, answers questions 4 and 7 of my research regarding jurisdiction and legal remedies (which include offences, penalties and civil remedies) that are available to an online consumer. Further, I submit that the provisions of Chapters III and VI of the CPA, are very broad and they address research questions 4 and 7.

Chapter VI deals with enforcement of the CPA. Part A and B (sections 99 to 106) empower the Commission to enforce the provisions of the Act through the following: enforcement functions of the Commission;<sup>192</sup> issuing of compliance notices;<sup>193</sup> objection to

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<sup>191</sup> s 96.

<sup>192</sup> s 99.

<sup>193</sup> s 100.

notices;<sup>194</sup> issuing of summons;<sup>195</sup> authority to enter and search any premises in terms of a warrant;<sup>196</sup> and claims that the information is confidential.<sup>197</sup> Part C of Chapter VI discusses applicable offences and penalties in the event of breach of the provisions of the CPA.<sup>198</sup> This part covers aspects such as breach of confidence, offences relating to the Commission and Tribunal, offences relating to prohibited conduct, penalties, administrative fines and vicarious liability. Part D deals with interim relief and civil actions and jurisdiction. It is my submission that the online consumer may directly or indirectly invoke some of the enforcement mechanisms, by simply following the prescribed procedure.

With regard to enforcement functions, the Commission is responsible to enforce this Act by–

- (a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;
- (b) receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance the provisions of the Act;
- (d) investigating and evaluating alleged prohibited conduct and offences;
- (e) issuing and enforcing compliance notices;
- (f) negotiating and concluding undertakings and consent orders;
- (h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and
- (i) referring alleged offences in terms of this Act to the National Prosecuting Authority.<sup>199</sup>

### *Compliance notices*

Section 100 contains very important provisions regarding compliance notices that may be issued by the Commission to a supplier. The section proclaims that the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct. A compliance notice issued in terms of this section remains in force until it is set aside by the Tribunal or a court upon a review of a Tribunal decision concerning the notice; or the

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<sup>194</sup> s 101.

<sup>195</sup> s102.

<sup>196</sup> s103.

<sup>197</sup> s 106.

<sup>198</sup> ss 107-113.

<sup>199</sup> s 99.

Commission issues a compliance certificate. If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission may apply to the Tribunal for the imposition of an administrative fine; or refer the matter to the National Prosecuting Authority for prosecution, provided that it may not do both in respect of any particular compliance notice.

### *Objection to compliance notices*

Section 101 on the other grants the supplier or complaint to apply to the Tribunal for the review of compliance notice issued by the Commission. The section provides that:

“(1) Any person issued with a notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form to review that notice within—

(a) 15 business days after receiving that notice; or

(b) such longer period as may be allowed by the Tribunal on good cause shown.

(2) After considering any representations by the applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of a notice.

(3) If the Tribunal confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it.”

Section 100 and 101 have since the coming into operation of the CPA been the subject of litigation between suppliers and consumers. It is important to state that judgements of the Tribunal have the same status as those made by the High Court of South Africa .Some of the judgments are of the Tribunal are:<sup>200</sup>

In *Multichoice Africa (Pty) Ltd v NCC*,<sup>201</sup> the hearing was as a result of the Applicant (Multichoice) objecting in terms of section 101(1) of the CPA, to the compliance notice issued by the Respondent (the Commission) against it on 13 October 2011 in terms of section 100(1) of the CPA.

The Applicant raised a point in *limine* and the Tribunal had to decide whether the Respondent consulted with the regulatory authority that issued the license to the Applicant, a

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<sup>200</sup> It is important to note that most of the judgments were not about online consumer protection or electronic commerce.

<sup>201</sup> NCT/3220/2011/101(1)(a)(P), 28 March 2012.

regulated entity, before issuing the compliance notice in terms of section 100(1)<sup>202</sup> of the CPA as required in section 100(2) of the CPA.

Section 100(2) states that “Before issuing a compliance notice in terms of subsection (1) to a regulated entity, the Commission must consult with the Regulatory authority that issued a license to that regulated entity.” According to this case, the Respondent had to consult with ICASA as the regulatory authority before issuing the compliance notice to the Applicant.

The Tribunal found that the Respondent did not discharge itself of the peremptory obligations placed on it in terms of section 100(2) of the CPA. This ground alone was found by the Tribunal to be sufficient to render the issuance of the compliance notice irregular and of no force and effect. The Tribunal ordered the cancellation of the compliance notice issued by the Respondent and made no order regarding costs.

Other cases where the Tribunal found against the Commission regarding compliance notices are:

*Quality Vacation Club v The National Consumer Commission* (discussed above);

*Audi SA (Pty) Ltd v The National Consumer Commission*.<sup>203</sup> In this case, (Audi SA (Pty) Ltd) the Applicant was issued with a compliance notice by the Respondent in respect of alleged contraventions of sections 55(2)(b), 56(2)(a) and (b) of the CPA.<sup>204</sup>

The compliance notice was dated 2 March 2012 and was received by the Applicant the same date. On 22 March 2012, the Applicant filed an application with the Tribunal objecting to the compliance notice and requesting that it be reviewed in terms of section 101(1) of the CPA and set aside. In the main, the basis of the objection was that the Applicant: (a) denied that sections 55 and 56 of the CPA apply retrospectively to cover the sale transaction which forms the subject matter of the compliance notice, and (b) contended that the Commission was not entitled to adjudicate disputes as it attempted to do, and as result, the Commission’s finding was *ultra vires*

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<sup>202</sup> Section 100(1) states that subject to subsection (2), the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct.”

<sup>203</sup> NCT/4058/2012/101(1)(P)CPA.

<sup>204</sup> Section 55 and 56 of the CPA deal with consumer’s right to safe, good quality goods and implied warranty of quality.

After hearing the matter, the Tribunal held<sup>205</sup> that the compliance notice the Respondent issued was fatally flawed and was as a result set aside.

In *Accordian Investments (Pty) Ltd v The National Consumer Commission*,<sup>206</sup> the Applicant objected to the compliance notice and brought an application to the Tribunal to review and set it aside in terms of the section 101(1) of the CPA. The Applicant based its objection to the compliance notice on the following grounds:

- a. The transaction out of which the complaint arose took place on 8 July 2010, prior to the commencement of the CPA on 31 March 2011, and therefore the CPA does not apply to it;
- b. The Respondent did not conduct an investigation into the complaints as required in terms of section 72 of the CPA before issuing the compliance notice;
- c. The Applicant has not contravened any provisions of the CPA and in particular not the sections referred to in the compliance notice;
- d. The steps that the Respondent ordered the Applicant to take as stipulated in the compliance notice are not steps directed at ensuring compliance with the provisions of the CPA that the Applicant is alleged to have transgressed and constitutes directions to the Applicant that falls outside of the Respondent's powers.

The Tribunal concluded that:

- a. The CPA did not apply to the transaction entered into between Applicant and the Complainant;
- b. Section 55 and 56 apply in respect of the defects in the goods and the services provided to the Complainant after the effective date of the CPA;
- c. The Respondent did not investigate the Complainant's complaints as enjoined in section 73 of the CPA.
- d. The compliance notice was therefore defective in that:
  - i. it did not comply with the requirements of section 100 (3)(c) in that it did not set out the nature and extent of non-compliance with the CPA; and

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<sup>205</sup> Paras 37-38.

<sup>206</sup> NCT/4061/2012/60(3) & 101(1)(P)CPA.

- ii. it contravened section 100(3)(d) of the CPA in that it contained steps exceeding the Respondent's powers.

As a result of the above, the compliance notice was cancelled by the Tribunal.

*Annual Report of the Commission for 2012/2013 Financial Year*

According to the Commission's Annual Report for the 2012/2013 Financial Year, mentioned the Commission's Legal Division has the primary task of defending matters before the Tribunal and in various courts in South Africa.<sup>207</sup> In terms of the Annual Report, the approach by the Division was revised due to the fact that the Tribunal found that due process was not followed by the Commission in several cases when issuing compliance notices (for instance, the Tribunal found against the Commission in several cases discussed in this dissertation).<sup>208</sup> In order to address the shortcoming, the Division which is mandated to ensure enforcement of the CPA, mentioned that it has revised its approach which included concentrating on applications for accreditation of the Industry Codes in line with the Commission's new strategic direction.<sup>209</sup>

*Summons*<sup>210</sup>

The Commission has powers that are aimed at supporting any investigation the Commission may have undertaken in terms of the CPA which includes the summoning of any witness. With regard to the discussion on online consumer protection, the Commission may summon a web supplier or any witness to appear before it and give evidence regarding a specific matter or complaint.

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<sup>207</sup> Commission's Annual Report op cit at 30.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> See section 102. The Commissioner, may where it has directed an inspector to conduct an investigation, at any time during an investigation issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject –

- a) to appear before the Commission, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or
- b) to deliver or produce to the Commission, or to an inspector or independent investigator, any book, document at a time and place specified in the summons.

### *Authority to enter and search premises in terms of a warrant*<sup>211</sup>

In terms of section 103, a judge of the High Court or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate if, from information on oath or affirmation, there are reasonable grounds to believe that a contravention of the Act has taken place; is taking place; or is likely to take place on or in those premises.

### *Offences and penalties*<sup>212</sup>

In my earlier discussion, I alluded to the fact that a supplier who contravenes the provisions of the CPA especially with regard to supplier prohibitions and duties relating to online consumer protection, may be liable for penalties that include a fine or imprisonment. The CPA therefore contains a comprehensive list of offences and penalties in the case of contravention of the Act, and these relate to: breach of confidence, hindering the administration of the Act; offences relating to the Commission and Tribunal; and offences relating to prohibited conduct. On penalties, the Act makes provision for administrative fines, and vicarious liability in the case where a person or supplier has been found guilty of contravening the provisions of the CPA. These offences and penalties, will where relevant apply to a web trader or any other person. The discussion on offences and penalties is aimed at signifying that the CPA is not a toothless piece of legislation and that any web trader who contravenes, the online consumer may assert his or right by laying a complaint with the relevant authorities and the web trader, if found guilty, may be fined or imprisoned.

### *Breach of confidence*<sup>213</sup>

Question 2 of my research was about whether the supplier has an obligation to protect personal information which may have been disclosed by an online consumer when visiting a website and conducting an electronic transaction. Section 107 seeks to answer this question, in that there is a legal duty on any supplier not to disclose the consumer's personal

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<sup>211</sup> In terms of section 103, a warrant to enter and search is valid until:

- a) it is executed;
- b) cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
- c) the purpose for issuing it has lapsed; or
- d) the expiry of one month after the date it was issued.

<sup>212</sup> ss 110- 113.

<sup>213</sup> s 107.

information obtained during the course of a transaction. Section 107 criminalises the breach of confidence and states that it is an offence to disclose any personal or confidential information concerning the affairs of any person obtained in carrying out any function in terms of this Act; or as a result of initiating a complaint or participating in any proceedings in terms of this Act. An offence is, however, not committed where the information was disclosed for the purpose of the proper administration or enforcement of this Act; for the purpose of the administration of justice; or at the request of an inspector, regulatory authority or Tribunal member entitled to receive the information.

#### *Offences relating to the Commission and Tribunal*<sup>214</sup>

A supplier commits an offence if that supplier contravenes or fails to comply with an order of the Tribunal. Further, a supplier commits an offence if that person –

- (a) does anything calculated to improperly influence the Tribunal or a regulator concerning any matter connected with an investigation;
- (b) anticipates any findings of the Tribunal or a regulator concerning an investigation in a way that is calculated to influence the proceedings or findings;
- (c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
- (d) wilfully interrupts the proceedings of a hearing or misbehaves in the place where a hearing is being conducted;

It is my submission that the Tribunal may find an online supplier guilty where the latter fails to comply with an order of the Commission or Tribunal or wilfully interrupts a hearing where a dispute relating to online consumer complaint is being heard.

#### *Penalties*

In terms of section 111, a supplier convicted of an offence in terms of this Act is liable –

- (a) in the case of breach of confidence, to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment. The magistrate court may however, still impose any sentence that he or she deems appropriate.

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<sup>214</sup> s 109.



### *Administrative fines*<sup>215</sup>

One of the most commendable provisions of the CPA is the one dealing with administrative fines which may be imposed by the Tribunal in the event the supplier is found not to have complied with the provisions of CPA. It is important to note that the Tribunal may impose an administrative fine in respect of prohibited or required conduct. The condition for imposing the administrative fine, is that the amount imposed in terms of the Act may not exceed 10 per cent of the respondent's annual turnover during the preceding financial year or R1 000 000.

### *Interim relief (section 114)*

In terms of section 114, an online consumer who has applied for relief to a court, or the complainant in a complaint that has been referred to the Tribunal, may apply to a court, or to the Tribunal, as the case may be, for an interim order, pending the outcome of the main case.<sup>216</sup> The interim order must not extend beyond the earlier of the conclusion of a hearing into an application or a complaint; or the date that is six months after the date of issue of the interim order.<sup>217</sup>

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<sup>215</sup> See s 112. When determining an appropriate administrative fine, the Tribunal must consider factors such as:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) the extent of the loss or damage suffered;
- (c) the behaviour of the respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
- (g) whether the respondent has previously been found in contravention of this Act.

<sup>216</sup> In terms of section 114, the court or Tribunal may grant an interim order if—

- (a) there is evidence that the allegations may be true;
- (b) an interim order is reasonably necessary to—
  - (i) prevent serious, irreparable damage to that person; or
  - (ii) to prevent the purposes of this Act being frustrated;
- (c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
- (d) the balance of convenience favours the granting of the order.

<sup>217</sup> s 114(2).

### *Civil actions and jurisdiction*<sup>218</sup>

The CPA grants a consumer affected by a relevant provision of the Act to, in certain instances; institute a civil claim against the supplier or any person in accordance with the provisions of section 115 of the Act. According to the CPA, if an agreement, provision of an agreement, or a notice to which a transaction or agreement is purported to be subject, has been declared by a provision of the Act to be void, that agreement, provision or notice is of no force or effect, unless a court has declared that the relevant provision of the CPA does not apply to the impugned agreement, provision or notice.

Although an online consumer may institute a civil claim against a supplier, it is critical to note that in terms of section 115(2), a consumer who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct:

“(a) may not institute a claim in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or

(b) if entitled to commence an action, when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form:

(i) certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;

(iii) stating the date of the Tribunal’s finding, if any; and

(iii) setting out the section of this Act which the Tribunal made its finding, if any”.

Consumers however need to be aware that an appeal or application for review against an order made by the Tribunal in terms of the Act suspends any right of either party to commence an action in a civil court with respect to the same matter, unless the court orders otherwise.<sup>219</sup>

### *Limitations of bringing action*<sup>220</sup>

The CPA contains a prescription provision and provides that a complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after the act or omission that is the cause of the complaint; or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased. This therefore

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<sup>218</sup> s 115.

<sup>219</sup> s 115(4).

<sup>220</sup> s 116.

means that an online consumer complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

## VI. APPLICABILITY OF THE ECT ACT WHERE THE CPA DOES NOT APPLY

The CPA does not apply to transactions if a certain section of the ECT Act applies. It is imperative that the online consumer must be aware of these provisions, to avoid duplication when asserting his or her legal rights. If the relevant section of the ECT Act applies, the corresponding section of the CPA will therefore not apply, and these five instances are:<sup>221</sup>

- a) if section 44 of ECT Act regarding cooling off period applies, section 16 of CPA which concerns the right to cool off within five days after direct marketing does not apply;
- b) if section 46 of ECT Act dealing with delivery applies, section 19 of CPA which deals with the consumer's rights to delivery or supply does not apply;
- c) if section 43 of ECT Act dealing with disclosure of price applies; section 23 of CPA concerning the disclosure of a price for goods and services, does not apply;
- d) if section 43 of ECT Act dealing with sales records applies, section 26 of CPA does not apply; and
- e) if sections 42 to 49 dealing with catalogue marketing applies, section 33 of the CPA does not apply.

In summary, the CPA applies to both natural and legal persons, and small to medium enterprises enjoy protection as consumers when they are involved in a transaction or potential transaction, for consideration, in the ordinary course of the supplier or service provider's

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<sup>221</sup> Caroline B Ncube 'Consumer Protection: Electronic Transactions Law', Department of Commercial Law, University of Cape Town, 2012. Licensed under a Creative Commons Attribution Non-commercial Share-Alike 2.5 South Africa License available at <http://etransactionslaw.uct.ac.za/lecture-4-consumer-protection>, accessed on 20 August 2014.

business.<sup>222</sup> Suppliers must comply with the provisions of the CPA when promoting or supplying goods or services to a consumer.<sup>223</sup>

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<sup>222</sup> Sylvia Papadopoulos 'Are we about to cure the scourge of spam? A commentary on current and proposed South African legislative intervention' (2012) 75 *THRHR* at 230.

<sup>223</sup> *Ibid.*

## CHAPTER 4

### UNSOLICITED COMMERCIAL COMMUNICATIONS AND DIRECT MARKETING, AND ONLINE AUCTIONS

#### I. INTRODUCTION

During the outline of my scope of the dissertation in Chapter 1, I mentioned that I will discuss two key aspects of online consumer protection, namely, unsolicited commercial communication and direct marketing and online auctions. The discussion of unsolicited commercial communications is important for analysis purposes given that it touches on data protection and the protection of a consumer's fundamental right to privacy, and accordingly, addresses question 2 of my research question. It also touches on the other questions such as if it is safe to transact online,<sup>224</sup> particularly when noting that a supplier may harvest an online consumer's information without consent and use it for ulterior motives; what are the obligations of the supplier;<sup>225</sup> which tribunal will have the jurisdiction to hear any dispute;<sup>226</sup> and whether online consumers have any legal recourse in the case of violation of their rights (enforcement, offences and penalties).<sup>227</sup>

The discussion of online auctions is relevant to my research question since it aims to depict that online auctions are governed by legislation and that online auctioneers have certain obligations<sup>228</sup> to comply with in order not to infringe the rights of online consumers; and that there are security considerations and the need to protect personal or confidential information.<sup>229</sup>

With regard to the question on regulation of e-commerce,<sup>230</sup> it is my submission that unsolicited commercial communications and online auctions are regulated by the ECT Act, CPA and POPI Act, as will be seen in Part A and Part B of the discussion that follows.

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<sup>224</sup> Question 1 of the research question.

<sup>225</sup> Question 6.

<sup>226</sup> Question 4.

<sup>227</sup> Question 7.

<sup>228</sup> Question 5.

<sup>229</sup> Question 2 and 5.

<sup>230</sup> Question 8.

## PART A: UNSOLICITED COMMERCIAL COMMUNICATIONS AND DIRECT MARKETING

### II. GENERAL PREMISE

There are various types of unsolicited commercial communications (UCC) which are via email (spam), telephone, sms or text message, spim (spam based on MS instant messenger), spit (VoIP spam), social networking spam (Facebook or twitter) and mobile phone messaging services (Whatsapp and BBM).<sup>231</sup>

Papadopoulos<sup>232</sup> argues that spam is regarded as a nuisance by most internet users, and account for a substantial percentage of all internet traffic. Spam presents itself in many different forms ranging from mildly annoying to outright harmful, objectionable and offensive form of UCC.<sup>233</sup> Spam also constitutes an abuse to recipient and internet service provider's resources and is regarded as a threat to e-mail and internet security.<sup>234</sup> Public annoyance with spam is on the rise, and many internet service providers (ISPs) in many jurisdictions world-wide are attempting to block spam from reaching their user's email boxes.<sup>235</sup>

Papadopoulos<sup>236</sup> goes on to define spam as "unsolicited bulk and/or commercial electronic communications or unsolicited e-mail or electronic junk mail". Schulz<sup>237</sup> on the other hand, summarises the problems associated with spam in the following manner:

- a) The recipient and ISP pay far more in time, and trouble as well as money, than the sender does, unlike advertising through the post office;

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<sup>231</sup> Caroline B Ncube 'Consumer Protection: Electronic Transactions Law' University of Cape Town. Licensed under the Creative Commons Attribution-NonCommercial-ShareAlike 2.5 South Africa License 2012 at 4. Powerpoint.

<sup>232</sup> Papadopoulos op cit at 85.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Andrea Schulz (ed) *Legal Aspects of an E-Commerce Transaction* 2006 263.

<sup>236</sup> Papadopoulos op cit at 85.

<sup>237</sup> Schulz op cit at 263.

- b) The recipient must take time to request removal from the mailing list, and most spammers claim to remove the names on request but rarely do so, which constitutes a violation of privacy;
- c) Many spammers use intermediate systems without authorisation to avoid blocks set up to avoid spam;
- d) Many spam messages are deceptive and partially or entirely fraudulent in nature (criminal or quasi-criminal in nature);
- e) Spammers often use false return addresses to avoid the cost of receiving responses;
- f) Some forms of spam are illegal in other jurisdictions in the United States.

I concur with Papadopoulos' argument that "unsolicited junk mail and the collection of personal information for direct marketing is not unique to online consumers, but the sheer magnitude, invasiveness and variety of these practices brought about by the advent of computers and the internet, as well as the risks or negative consequences associated with the digital environment, have solicited worldwide consumer and data protection responses."<sup>238</sup> These data protection interventions have been introduced in many countries such as the US, Australia and Canada,<sup>239</sup> and South Africa followed suit when Parliament passed the relevant legislation to curb this problem.<sup>240</sup>

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<sup>238</sup> Papadopoulos op cit at 224.

Papadopoulos argues in this article that various international instruments such as "the Data Protection Directive 95/46/EC of the European Parliament of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data and the OECD Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data 23 September 1980" are the documents that solicited worldwide responses on consumer and data protection.

<sup>239</sup> Schulz op cit at 261 - 270.

Schulz argues that the worldwide solutions to fight the spam tide were necessitated by the exponential growth of the spam problem. In her paper, she further articulates that global antispam law and policy can be divided into three phases, namely:

- (a) The first phase which began in the year 2000, was marked by a very limited concern for the impact of spam and it was also perceived at the time that the marketplace could effectively curb the problem;
- (b) The second phase, between year 2000 and 2003, was characterised by an adherence to a three part anti-spam solution made up of education, technology and legal solutions. In this phase, government had already identified that it had a role to play in combating spam but was careful not to encroach into the private sector, since the understanding was that private sector could effectively address the problem;
- (c) The third phase began in 2004, and is still continuing to shift towards greater intervention by the government since it was realised that education, technology and legal solutions, alone, are not adequate in addressing the dangers associated with spam.

### III. CRITICAL ISSUES RAISED BY SPAM

Ncube identifies several issues raised by spam, namely:<sup>241</sup>

*a) Invasion of privacy.*

Harvesting emails and personal data may amount to invasion of privacy. The overloading of a person's mailbox with unwanted material maybe a nuisance and an invasion of the right to privacy. Such invasion of privacy may be unacceptable within the constitutional and common law context.

*b) Costs of managing spam*

The managing of spam can be too costly since ISPs would have to cope with internet traffic. Businesses may waste resources and time due to overloaded information systems and individuals and employees often waste time as result of deleting spam. The main problem with spam is that "by sending spam mail the advertisers transfer the advertising costs to the consumer who spends valuable time reading the e-mails", some of which may be of no assistance to him or her at all.<sup>242</sup>

*c) Security risk*

Spam can constitute a security risk in that computer viruses could be spread by the spamming organisations.

*d) Loss of reputation to business and individuals*

An individual or business may suffer reputational damage especially if the email address is spoofed<sup>243</sup> and if the email is identified as spam and blocked by ISP or other

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Schulz concludes that an anti-spam strategy is an enforcement problem requiring the involvement of government, at national and international level.

<sup>240</sup> Statutes passed to curb spam are the, ECT Act, CPA and POPI Act.

<sup>241</sup> See Caroline Ncube 'Advertising and Marketing: Electronic Transactions Law ' University of Cape Town. Licensed under the Creative Commons Attribution-NonCommercial-ShareAlike 2.5 South Africa License 2012 at 6. Powerpoint.

<sup>242</sup> de Cock Buning et al at 299.

<sup>243</sup> See searchsecurity,techtargert.com/definition/email-spoofing, accessed on 5 September 2014, where E-mail spoofing is defined "as the forgery of an email header so that the message appears to have originated from someone or somewhere other than the source". Spoofing is normally used by distributors of spam as an attempt



businesses. Spoofing could damage the reputation of a business in that spammers could forge the header of an email and then send spam to recipients so that it looks like it is from a well-known and respected company, whereas that is not the case.

Despite the many disadvantages of spam, Schulz cautions that on a fundamental level, anti-spam advocates have battled to convince consumers not to read spam and that they should merely delete it.<sup>244</sup> Evidence was able to prove that a sizable number of consumers respond to spam.<sup>245</sup> For instance, at a Federal Trade Commission workshop, “it was reported that 8% of internet users have purchased goods or services as a result of reading a spam message, providing ample evidence that spam can be an effective marketing tool”.<sup>246</sup>

*e) Danger to internet*

Spamming campaigns may act as a form of denial of service and could result in the internet being slow. Further, offensive and illegal content could be circulated via spam such as defamatory and pornographic material.

Various ways of regulating or combating the spam scourge include:

- a) Legislation, by means of opt-out and opt-in mechanisms; prohibition of sale and distribution of spam ware; and enforcing ISPs anti-spam policies.<sup>247</sup>
- b) Blacklisting (although blacklisting might have some legal challenges where blacklisted persons / institutions may lodge defamation claims).<sup>248</sup>
- c) Common law principles relating to nuisance and/or privacy.<sup>249</sup>
- d) Technological solutions, which can take three forms.<sup>250</sup>

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to get email recipients to open and possibly respond to such emails, where they wouldn't have, had they known that it is a spam.

<sup>244</sup> Schulz op cit at 271.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> See Ncube 'Advertising and Marketing: Electronic Transactions Law' supra.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Schulz op cit at 268.

- Installing spam filtering systems that block purported spam messages at the server level, thereby stopping them from leaving their systems.
- Installing filtering systems which are designed to block spam messages from entering the user's email inbox;
- Users to install spam filtering systems on their computers and to use the filters to sort through email already found in the user's inbox, and thereby deleting spam.

The only challenge with spam filtering systems is that they not solve the spam problem entirely, as a user may end up blocking or deleting real email messages.<sup>251</sup>

- e) Education – educating both consumers and businesses is regarded as one of the second important element in combating the spam tide (after legal and technological solutions);<sup>252</sup>

#### IV. REGULATION OF SPAM IN SOUTH AFRICA

In South Africa, the legislative intervention which is aimed at regulating spam (unsolicited commercial electronic communications) is in the form of the ECT Act, POPI Act and CPA. As mentioned above, the provisions of POPI Act are not yet fully operational, meaning that spam is currently regulated by section 45 of the ECT Act, although this section will be repealed when the POPI Act comes into operation, and as a result, section 69 will become operative.<sup>253</sup>

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<sup>251</sup> Ibid.

<sup>252</sup> Ibid at 269. Anti-spam advocates have warned users not to respond directly to spamming organisations, even if to “opt-out” of future spam messages. The understanding is that spamming organisations use the opt-out message to verify the particular e-mail address, and thereafter, a series of spam messages follow.

<sup>253</sup> Section 45 of the ECT Act reads as follows:

Unsolicited goods, services or communications

- (1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer—
  - (a) with the option to cancel his or her subscription to the mailing list of that person; and
  - (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.
- (2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.
- (3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).
- (4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

As discussed in Chapter 2 above, I must mention that the Bill also seeks to make some critical and necessary amendments with regard to spam, particularly in inserting a definition and amending section 45.<sup>254</sup> These two fundamental amendments are discussed in Chapter 2, paragraph VII. Suffice to mention that in terms of the Bill, unsolicited communications would be unlawful, unless the recipient has given consent to receive such communication, meaning that the Bill seeks to introduce the opt-in principle.<sup>255</sup>

On the other hand, Chapter VII (sections 69 to 71) of the POPI Act titled “rights of data subjects regarding direct marketing by means of unsolicited communications, directories and decision making” governs the issue of spam. This therefore means that in South Africa, spam is regulated by the ECT Act, CPA and POPI Act. All the three pieces of legislation, however, do not use the term spam, but instead refer to the consumer’s right to restrict unwanted direct marketing or unsolicited communications.<sup>256</sup>

South Africa has followed other jurisdictions such as the United States, European Union, South Korea, Australia and Japan in enacting its anti-spam legislation.<sup>257</sup> All the anti-spam legislation of the mentioned countries contains civil and criminal sanctions which include fines, damages and imprisonment for repeat offenders.<sup>258</sup> The United States’ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,<sup>259</sup> for instance provides for tripled damages for any violation of the anti-spam provisions, and where the violation was:<sup>260</sup>

- a) done knowingly and wilfully;
- b) used email addresses obtained through harvesting;

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<sup>254</sup> According to the Memorandum on the Objects of the Bill, when dealing with the proposed amendment of section 45, the drafters took into account public views and suggestions on that spam be minimised or prevented altogether.

<sup>255</sup> See Memorandum on the Objects of the Bill *supra*, at para 2.14. In making the changes, the definition was guided by the provisions of the CPA, although no consequential changes will be made in the CPA.

<sup>256</sup> See section 11 and 32 of the CPA.

<sup>257</sup> Schulz *op cit* at 271-272.

<sup>258</sup> *Ibid* at 272.

<sup>259</sup> 15 U.S.C. ch. 103

<sup>260</sup> *Ibid*.

- c) engaged in a dictionary attack;<sup>261</sup>
- d) used automated services to register for multiple email addresses;
- e) accessed a computer or computer network without authorisation and knowingly relayed commercial email messages from that computer without authorisation.

## V. DIRECT MARKETING UNDER THE CPA

### a) General premise

As compared to section 45 of the ECT Act, the CPA (and the regulations thereto) contains provisions that regulate direct marketing, and the emphasis is placed on honest, fair and responsible conduct by suppliers and service providers when marketing goods or services to consumers.<sup>262</sup> “*Direct marketing*” is defined in the CPA as an to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind.<sup>263</sup> Further, an “*electronic communication*” is defined as communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device.<sup>264</sup>

It is important to mention that spam per se is not illegal in South Africa.<sup>265</sup> The sender will, however, be guilty of an offence if they send direct marketing material in contravention of the

<sup>261</sup> According to Schulz, ibid at 271, “an email “*dictionary attack*” occurs when spamming organisations use machine generated email addressed at popular e-mail providers to query the validity of those addresses. The information is then used either to send spam messages or sold to other spamming organisations”. For example, a computer generated email sending millions of emails to gmail.com account users could be a dictionary attack.

<sup>262</sup> Papadopoulos & Snail op cit at 88.

<sup>263</sup> s 1 of the CPA.

<sup>264</sup> The definition of “electronic communications” in the CPA is much more encompassing and different from the ECT Act definition which provides that “electronic communication” means a communication by means of data messages which is data that is generated, sent received or stored by electronic means. Papadopoulos op cit at 88 mentions that the reason for such differentiation may be that in the CPA, the legislator intended to regulate direct marketing via the telephone and postal services, whereas the ECT Act is mainly concerned with electronic data.

<sup>265</sup> See Lance Michalson “The law vs the scourge of spam” September 2003 available at <<http://michalsons.co.za/the-law-vs-the-scourge-of-spam/1019>, accessed on 21 August 2014. Michalson argues

CPA and POPI provisions.<sup>266</sup> The consumer may instead of following the criminal proceedings route, lodge a complaint with the Commission, the Ombud or the Tribunal (and this addresses question 4 dealing with jurisdiction).<sup>267</sup>

b) Key provisions of the CPA regarding direct marketing

The research question regarding protection of information and privacy of the consumer is addressed by section 11 of the CPA, (read with the regulations) which gives effect to the entrenched constitutional right to privacy and sets out in unambiguous terms, the right of a consumer to restrict unwanted direct marketing. Papadopoulos<sup>268</sup> correctly argues that this provision that restricts unwanted direct marketing is a long overdue intervention by Parliament and needs to be welcomed by consumers. This discussion addresses questions 2 and 6 dealing with privacy imperatives and supplier prohibitions.

In terms of section 11, every person has the right to privacy. The privacy right includes the right:

- a) to refuse to accept;
- b) to require another person to discontinue; or
- c) in the case of an approach other than in person, to pre-emptively block, any approach or communication that is primarily for the purpose of direct marketing.

In order to ensure the realisation of each consumer's right to privacy, and to enable consumers to efficiently protect themselves against direct marketing activities, a consumer who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication.<sup>269</sup> This practically means

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that section 45 of the ECT Act is problematic, and identifies six problematic issues, namely: Section 45 does not apply to legal persons, it was not clear as to what constitutes a proper opt-out, the term "sender" is not defined, the term "unsolicited" was not defined, the term "commercial" was not defined and the term "communication" in the context of spam is not defined. As a result, he proposed legislative amendments.

<sup>266</sup> See Michalson *ibid*.

<sup>267</sup> *Ibid*; See also section 69 of the CPA.

<sup>268</sup> Papadopoulos *op cit* at 88.

<sup>269</sup> s 11(2) of the CPA.

that the consumer may opt-out from receiving any direct communications from certain suppliers or direct marketers. The Bill which seeks to introduce the opt-in regime regarding direct marketing is to be welcomed as it means that both the opt-in and opt-out mechanisms will be applicable.<sup>270</sup>

The Commission may also establish, or recognise as authoritative, a registry in which any person may register a pre-emptive block, against any communication that is primarily for the purpose of direct marketing.<sup>271</sup> A pre-emptive block becomes effective 30 days from the date of its registration.<sup>272</sup> A person authorising or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of demands, keep records of all opt outs received from consumers and must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to a person who has made a demand not to receive direct marketing or has registered a relevant pre-emptive block.<sup>273</sup> It is important to note that no fee is payable by a consumer to any supplier when making a demand or registering a pre-emptive block.<sup>274</sup>

Section 12 read with the CPA Regulations<sup>275</sup> regulate the time where suppliers and service providers may contact consumers for direct marketing purposes.<sup>276</sup>

#### *Times for contacting consumers for direct marketing purposes*

Regulation 4 deals in great detail with and succinctly sets out the scope and limits of direct marketing communications. In terms of section 12, read with the regulations, the supplier is barred from engaging in any direct marketing directed to a consumer at home for any promotional purpose during a prohibited period prescribed in terms of this section, except to

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<sup>270</sup> See also Memorandum on the Bill, supra, para 2.14 which stipulates that the CPA will not be amended as a result of the changes that the Bill proposes.

<sup>271</sup> s 11(3) of the CPA.

<sup>272</sup> reg 4(3)(d).

<sup>273</sup> s 11(4).

<sup>274</sup> s 11 (5).

<sup>275</sup> See *Government Gazette* No. 34180, Government Notice No. 293 of 1 April 2011.

<sup>276</sup> Section 12(2) of the CPA provides that in order to protect the privacy of consumers, the Minister has in terms of the above-mentioned *Gazette* No. 34180 published the regulations that prescribe specific days, dates, public holidays or times of days in which suppliers may contact consumers for direct marketing purposes.

the extent that the consumer has expressly or implicitly requested or agreed otherwise. The Notice “Prohibited Time for contacting Consumers” stipulates that the following are days, dates, public holidays or times of days when a supplier may not engage in any direct marketing directed to a consumer at home:

- (a) Sundays or public holidays;
- (b) Saturdays before 09h00 and after 13h00; and
- (c) all other days between the hours of 20h00 and 08h00 the following day, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.

The restriction on the times stated above also applies to the delivery of direct marketing to the consumer, unless expressly agreed to in writing, by the consumer. Direct marketing which was submitted outside of the prohibited times and received by the consumer within the prohibited times does not necessarily constitute a breach of this provision on the part of the direct marketer, however, the onus to prove that the direct marketing was dispatched during the allowed period rests on the direct marketer.<sup>277</sup>

Regulation 4(3) gives effect to the provisions of section 11(6) of the CPA which requires the Minister of Trade and Industry to prescribe regulations for the operation of a registry where consumers may register a pre-emptive block against any direct marketing by suppliers or marketers. Some principles that are required for the operation of the registry are that the registry must at all times be accessible to all persons in the Republic for purposes of registering a pre-emptive block, without payment of any fee; and the registry must be capable of accommodating all persons in the Republic and cover the whole geographical area of the Republic.<sup>278</sup>

A consumer may register:<sup>279</sup>

- (i) his or her name, identification number, passport number, telephone number, cell phone number, facsimile number, e-mail address, postal address, physical address, a website uniform resource locator (“URL”) or any other identifier which the operator of the registry makes provision for;

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<sup>277</sup> Notice on “Prohibited Time for contacting Consumers” CPA Regulations.

<sup>278</sup> reg 4(3) (a)-(b).

<sup>279</sup> reg 4(3)(c).

- (ii) the consumer's own global address for any website or web application or site on the world wide web;
- (iii) if the operator of a registry so allows, a pre-emptive block for any time of the day or any day of the year; or
- (iv) if the operator of a registry so allows, a comprehensive prohibition for any medium of communication, address or time whatsoever.

In South Africa there are several industry bodies dealing with direct marketing, namely:<sup>280</sup> Direct marketing Association of South Africa which administers the national opt-out register (pre-emptive block);<sup>281</sup> Internet Service Providers Association (ISPA) which is in favour of the opt-in provisions;<sup>282</sup> and the Wireless Application Service Providers Association (WASPA) Code of Conduct which uses an opt-out approach.<sup>283</sup>

The administrator of the registry may not under any circumstances provide, sell, or otherwise dispose of any information mentioned in paragraphs (i) to (iv) above to anyone, including any organ of state, except with the written and express permission of the consumer concerned, by order of a court of law or the operation of law. A direct marketer must assume that a comprehensive pre-emptive block has been registered by a consumer unless the administrator of the registry has in writing confirmed that a pre-emptive block has not been registered.<sup>284</sup>

It is crucial to state that section 32 of the CPA further protects the consumer's right against direct marketing and provides that a person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement.<sup>285</sup> Section 32(2) contains a warning to direct marketers and stipulates that if a person who has marketed any goods has left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 applies. Section 21

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<sup>280</sup> See Ncube, *supra*.

<sup>281</sup> Established in 2007 and available at <https://www.nationaloptout.co.za>

<sup>282</sup> Code of Conduct available at <http://ispa/code-of-conduct>.

<sup>283</sup> See [http://www.waspa.org.za/code/waspa\\_coc\\_6.1\\_pdf](http://www.waspa.org.za/code/waspa_coc_6.1_pdf).

<sup>284</sup> reg 4(3)(g).

<sup>285</sup> s 32(1).



provides that a consumer has no obligation to pay a supplier for unsolicited goods or services; and a supplier must not demand or assert any right to, or attempt to collect, any payment from a consumer in respect of any charge relating to unsolicited goods left in the possession of a consumer, under certain circumstances.<sup>286</sup>

Question 5 of my research question dealing with supplier obligations is therefore addressed by section 32 which requires the direct marketer to inform the consumer of his or her rights to cancel an agreement, failing which, consequences will follow at the instance of the consumer. Section 21 on the other hand, addresses question 7, regarding legal remedies that may be available to an online consumer.

I submit that the CPA provides protection to the online consumer, in that the receipt of communications sent via electronic transmissions that has a direct marketing element (promoting or offering to supply goods or services) can be restricted or pre-emptively blocked.<sup>287</sup> However, as with the ECT Act, if the electronic communication constitutes junkmail or spam that “does not promote or offer to supply goods or services, it cannot be restricted or pre-emptively blocked and the consumer will therefore have to continue to rely on software and junkmail settings”.<sup>288</sup>

## VI. DIRECT MARKETING UNDER THE POPI ACT

### a) General premise

As articulated above, the POPI Act was published on 26 November 2013,<sup>289</sup> but this legislation is not yet fully operational as only limited sections are in force.<sup>290</sup> Despite the

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<sup>286</sup> s 21(7)-(8).

<sup>287</sup> Papadopoulos & Snail op cit at 89.

<sup>288</sup> Ibid.

<sup>289</sup> See <http://www.ensafrica.com/news/limited-sections-of-POPI-have-commenced?Id=1405&STitle=TMT%newsflash>, accessed on 5 September 2014.

<sup>290</sup> See <http://www.michalsons.co.za/popi-commencement-date/13109>, accessed on 5 September 2014. In terms of the Presidential proclamation published in April 2014, only section 1, Part A of Chapter 5 (Information Regulator), section 112 and 113 dealing with regulations and the procedure for making regulations, have commenced.

POPI Act not being in full force, it is important to discuss it here since it will sooner or later be used as legislation governing spam, amongst other matters. The POPI Act seeks to promote the protection of personal information<sup>291</sup> which is processed by public and private bodies and to ensure that personal information that is processed by these bodies is in line with international standards.<sup>292</sup> The POPI Act was drafted in order to give effect to the constitutional right to privacy by ensuring that personal information is protected by the State against unlawful collection, use and transfer.<sup>293</sup>

I submit that the POPI Act, is an invaluable piece of legislation in terms of protecting government institutions and the business sector, especially those within the insurance, online retail, investment, banking and electronic sphere as regards the “importing” and “exporting” (free flow) of personal information relating to data subjects.<sup>294</sup> It also regulates direct marketing in a clearly defined manner, in line with section 14 of the Constitution (right to privacy),<sup>295</sup> as will be seen in the discussion below.

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<sup>291</sup> According to section 1 of POPI, ‘personal information’ means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

<sup>292</sup> See POPI, long title and preamble.

<sup>293</sup> Ibid, preamble and s 2.

<sup>294</sup> Sizwe Snail and Sylvia Papadopoulos ‘Privacy and Data Protection’ In S Papadopoulos And S Snail (eds) *Cyberlaw@SA III* (2012, Van Schaik) 299.

<sup>295</sup> Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 692 argue that with regard to the protection of privacy, there must be legislation that restricts the collection, use and transfer of information

The most important provisions of the POPI Act are briefly summarised below:

*i. Field of application, exclusions and exemptions*

The Act applies to all personal information that is processed by public and private bodies (responsible party). The personal information must be processed by means of entering it into a record or by making use of automated and non-automated means irrespective of whether the responsible party is domiciled in South Africa or abroad, and if abroad, on condition that those means are utilised for the purpose of transferring the personal information via South Africa.<sup>296</sup>

*ii. Rights of data subjects*

Similar to the provisions of the EU Data Protection Directive, mentioned above, section 5 contains nine rights which a data subject has, regarding the processing of his or her personal information which include the right:

- to be notified that their personal information is being collected by a responsible party or has been accessed by an unauthorised person;
- to enquire whether a responsible party holds their personal information and to request access to it;
- to request for the deletion, correction or destruction of their personal information;
- to object, on reasonable grounds, on the processing of their personal information which include the processing of their personal information for direct marketing purposes;

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and that persons have a right to know who keeps information about them and they should be afforded an opportunity to correct that information if it is incomplete, inaccurate and deceptive.

<sup>296</sup> POPI Act s 3; See also section 6 which provides that POPI Act does not apply to the processing of personal information:

- a) in the course of a purely personal or household activity;
- b) that has been de-identified to the extent that it cannot be re-identified again;
- c) by or on behalf of the public body and which involves national security, defence or public safety or the purpose of which is the prevention, investigation or proof of offences such as money laundering;
- d) by Cabinet and its committees, the Executive Council of a province and a Municipal Council of a municipality;
- e) relating to the judicial functions of a court referred to in section 166 of the Constitution.

- not to have their personal information processed for purposes of direct marketing by means of unsolicited electronic means;
- to submit a complaint to the Regulator regarding the alleged interference with the protection of their personal information; and
- to institute civil proceedings regarding the alleged interference with the protection of their personal information.

iii. *Information protection conditions*

Chapter III of the Act contains eight conditions for the lawful processing of personal information<sup>297</sup> and they must be complied with by the responsible party for the lawful processing of personal information, namely: accountability, processing limitation, purpose specification, further processing limitation, information quality, security safeguards<sup>298</sup> and data subject participation.

## VII. KEY PROVISIONS OF THE POPI ACT REGARDING DIRECT MARKETING

Chapter VIII (sections 69 to 71) of the POPI Act deals with the rights of data subjects regarding direct marketing by means of unsolicited electronic communications, directories and automated decision making. The wording of the sections also constitutes a substantial improvement from section 45 of the ECT Act. However, similar to the CPA, the term “unsolicited” is not defined, which is a shortcoming by the legislature since this term is critical to what section 69 seeks to regulate. It is my submission that the Bill, by inserting a definition of “*unsolicited communication*”, seeks to address this challenge.

The discussion of the POPI Act addresses question 2 of my research question in that it regulates the protection of personal and confidential information of a data subject for direct marketing purposes. Processing of information must be done in accordance with the provisions of the POPI Act, and failure to comply constitutes a criminal offence.

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<sup>297</sup> Ibid ss 7- 22.

<sup>298</sup> See Condition 7 – Security safeguards: The condition provides that the responsible party must secure the integrity of information in its possession or under its control by taking technical and organisational measures to prevent its loss, destruction or unauthorised access. This condition also applies to an operator who processes information on behalf of a responsible party in terms of a contract.

a) Direct marketing by means of unsolicited electronic communications

Section 69 prohibits the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail unless the data subject has given consent or the data subject is a customer of the responsible party.<sup>299</sup>

A responsible party<sup>300</sup> may only process the personal information of a data subject who is a customer of the responsible party.<sup>301</sup>

- a) if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
- b) for the purpose of direct marketing of the responsible party's own similar products or services; and
- c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details:
  - (i) at the time when the information was collected; and
  - (ii) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.

Section 69(3) contains a very important stipulation which reads that any communication for the purpose of direct marketing must contain details of the identity of the sender or the person on whose behalf the communication has been sent; and an address or other contact details to

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<sup>299</sup> In terms of section 69(2):

- (a) A responsible party may approach a data subject—
  - (i) whose consent is required in terms of subsection (1)(a); and
  - (ii) who has not previously withheld such consent,only once in order to request the consent of that data subject.

- (b) The data subject's consent must be requested in the prescribed manner and form.

<sup>300</sup> In terms of section 1 of the POPI Act, "responsible party" means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

<sup>301</sup> s 69(3).

which the recipient may send a request that such communications cease.<sup>302</sup> “*Automatic calling machine*”, for purposes of subsection (1), means a machine that is able to do automated calls without human intervention. I submit that section 69 constitutes a great improvement from section 45 of the ECT Act in so far as it prohibits the processing of personal information of a data subject unless the latter has given consent to the processing.<sup>303</sup>

b) Printed or electronic directories

The data subject who is a subscriber to a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which his, her or its personal information is included, must be informed, free of charge and before the information is included in the directory about (a) the purpose of the directory; and (b) any further uses to which the directory may possibly be put, based on search functions embedded in electronic versions of the directory.<sup>304</sup>

If the personal information of data subjects who are subscribers to fixed or mobile public voice telephony services have been included in a public subscriber directory in conformity with the conditions for the lawful processing of personal information prior to the commencement of section 70, the personal information of such subscribers may in accordance with the POPI Act, remain included in that public directory in its printed or electronic versions, after having received the information.<sup>305</sup> Automated decision making

Subject to section 71(2), a data subject may not be subject to a decision which results in legal consequences for him, her or it, or which affects him, her or it to a substantial degree,

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<sup>302</sup> s 69(3).

<sup>303</sup> Papadopoulos op cit at 90.

<sup>304</sup> s 70(1); In terms of section 70(2)-(3), the data subject must be given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its personal information or to request verification, confirmation or withdrawal of such information if the data subject has not initially refused such use. The above-mentioned requirements do not apply to editions of directories that were produced in printed or off-line electronic form prior to the commencement of this section.

<sup>305</sup> s 70(4); In terms of the POPI Act, “Subscriber”, for purposes of section 70, means any person who is party to a contract with the provider of publicly available electronic communications services for the supply of such services.

which is based solely on the basis of the automated processing of personal information intended to provide a profile of such person including his or her performance at work, or his, her or its credit worthiness, reliability, location, health, personal preferences or conduct.

The provisions of section 71(1) do not apply if the decision has been taken in connection with the conclusion or execution of a contract, and:

- (a) the request of the data subject in terms of the contract has been met; or
- (b) appropriate measures have been taken to protect the data subject's legitimate interests; or
- (c) it is governed by a law or code of conduct in which appropriate measures are specified for protecting the legitimate interests of data subjects.

The appropriate measures, referred to above, must provide an opportunity for a data subject to make representations about such a decision; and require a responsible party to provide a data subject with sufficient information about the underlying logic of the automated processing of the information relating to him or her to enable him or her to make representations.

c) Enforcement, offences, penalties and administrative fines

In my introduction of Chapter 4, I mentioned that as part of my analysis I will address the issue of jurisdiction and enforcement mechanisms or legal remedies that may be available to a data subject where personal information was processed by a responsible party in contravention of the POPI Act. The following discussion therefore addresses questions 4 and 7 of my research questions.

Chapters 10 and 11 of the POPI Act contain important provisions dealing with enforcement as well as offences and penalties, in the case of non-compliance with the provisions of the Act. Interference with the protection of personal information of a data subject refers to:<sup>306</sup>

- i) any breach of the conditions for the lawful processing of personal information set out in Chapter 3;
- ii) non-compliance with sections 69, 70, 71 or 72 of the Act (amongst others); and

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<sup>306</sup> POPI Act s 73.

iii) a breach of the provisions of a code of conduct.

The above provisions therefore mean that a data subject (online consumer) may lodge a complaint with the Regulator where there has been an interference with the protection of their personal information or in the case of being dissatisfied with an adjudicator's decision.<sup>307</sup> A responsible party or complainant may appeal to the High Court for the setting aside or variation of an enforcement notice issued by a Regulator or against the Regulator's decision to investigate.<sup>308</sup> The data subject, or the Regulator, when requested by the data subject, may institute a damages lawsuit in any court of law against a responsible party for breach of the provisions of the POPI Act, regardless of whether there was negligence on the part of the responsible party.<sup>309</sup> Therefore, with regard to the research question regarding jurisdiction, the Regulator is entrusted with the authority to hear the dispute and appeal or review lies with a division of the High Court in South Africa.

As alluded to above, Chapter 11 contains a long list of offences in the case of obstructing or unlawfully influencing the Regulator,<sup>310</sup> breach of confidentiality,<sup>311</sup> obstruction regarding the execution of a search warrant,<sup>312</sup> failure to comply with enforcement or information notices.<sup>313</sup> With regard to penal provisions, for instance, any person (or a responsible party) convicted of an offence in terms of the Act is liable to a fine or imprisonment not exceeding 10 years or both.<sup>314</sup>

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<sup>307</sup> Ibid s 74.

<sup>308</sup> Ibid s 97.

<sup>309</sup> Ibid s 99(1). Section 99(2) however, provides the responsible party with defences against damages lawsuit which may include *vis maior*, consent or fault on the part of the plaintiff, the breach was authorised by Regulator in terms of section 37.

<sup>310</sup> Ibid s 100.

<sup>311</sup> Ibid s 101.

<sup>312</sup> Ibid s 102.

<sup>313</sup> Ibid s 103.

<sup>314</sup> Ibid s 107.



## PART B      ONLINE AUCTIONS

### I.      GENERAL PREMISE

I earlier mentioned at the beginning of this chapter that the discussion on online auctions within the context of online consumer protection is relevant to my research question since it aims to depict that online auctions are governed by legislation and as result, online auctioneers have certain obligations to comply with in order not to infringe the rights of online consumers; and there are security and privacy imperatives that also require some attention from an online auctioneer. Therefore the research questions that are addressed in this discussion are: obligations of an online auctioneer and the duty to protect confidential information (question 1, 2 and 6). It must be noted that other matters that were discussed in Chapter 3 regarding the offences and penalties that may follow as a result of the contravention of the CPA will, where relevant, also apply even in the case of online auctions.

### II.      RULES APPLICABLE TO AUCTIONS GENERALLY

Section 45 of the CPA and regulations 18 to 33 of the CPA Regulations of 1 April 2011 regulate all types of auctions. According to the CPA, the term “*auction*” includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction.<sup>315</sup> The CPA and the Regulations contain a detailed list of principles or rules that must be adhered to by all auctioneers, when conducting auctions. It therefore follows that many website or online auctioneers would have to drastically overhaul their websites to comply with the provisions of the law and to offer consumers the much needed protection.<sup>316</sup>

The following are the general principles applicable to auctions:<sup>317</sup>

- (a) When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction;

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<sup>315</sup> s 45(1).

<sup>316</sup> Papadopoulos op cit at 84.

<sup>317</sup> s 45(2)-(5).

- (b) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made;
- (c) Notice must be given in advance that a sale by auction is subject to a reserved or upset price or a right to bid by or on behalf of the owner or auctioneer;
- (d) Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer, the owner or auctioneer must not bid or employ any person to bid at the sale and an auctioneer may not accept a bid from either;
- (e) The consumer may approach a court to declare the transaction fraudulent, if the provisions of the CPA, (as stated above) have been violated.<sup>318</sup>
- (f) With regards to the actual auction, the “rules of the auction” must be in writing and the document must be made available to the general public at least 24 hours prior to the commencement of the auction.<sup>319</sup> The rules must also provide that an auction will commence at the published time and that it will not be delayed to enable any specific person or more persons in general to take part in the auction. Any person who attends the auction to bid on behalf of another person must produce a letter of authority meeting the requirements of regulation 26(3) in order to bid on behalf of that person.<sup>320</sup>
- (g) An auctioneer owes a duty of care towards his or her client and must protect and secure the goods whilst under his or her control or in his or her possession; preserve a professional, confidential relationship with his or her client; and timeously reveal estimated costs and services for conducting the auction;<sup>321</sup>
- (h) An auctioneer, an employee of the auctioneer or the auction house, may not knowingly enter in any record kept or required to be kept by the auctioneer in terms of any law, any name or other details other than the real name and details of the actual successful bidder;<sup>322</sup> and

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<sup>318</sup> Section 46(6) further empowers the Minister to prescribe requirements to be complied with by an auctioneer in respect of—

- (a) the conduct of an auction;
- (b) the records to be maintained with respect to property placed for auction; and
- (c) the sale of any such property by auction.

<sup>319</sup> reg 21(1).

<sup>320</sup> reg 21(1)(g).

<sup>321</sup> reg 22(4).

<sup>322</sup> reg 25.

- (i) An auctioneer must for every auction, have a bidders' record to record the identity of all bidders at an auction and further ensure that this record is made available for public inspection.<sup>323</sup>

### III. RECORDS OF ALL AUCTIONS

All records prescribed in regulations 18 to 33 must be kept for a period of at least three years. Any person in possession of any record contemplated in regulations 18 to 33 must upon receipt of a written request at his or her own cost provide the Commission or any forum empowered to administer the Act or an owner or rightful holder or a registered bidder with true copies of the record so requested or which may be relevant to any record so requested, but if the original record is expressly requested, that original record must be made available for inspection.<sup>324</sup>

### IV. RULES APPLICABLE TO ONLINE AUCTIONS<sup>325</sup>

Regulation 30 of the CPA contains rules that are exclusively aimed at auctions that are conducted via the internet and other electronic medium. These are:

- (a) The auction may be conducted via the internet or other electronic medium irrespective of where the server or other electronic medium is situated, only if it meets all requirements in respect of an auction provided for in the CPA regulations or other applicable law;
- (b) The relevant internet website or electronic medium must:<sup>326</sup>
  - (i) be available to anyone over the age of 18 years at any time of the day;
  - (ii) provide high standards of security for electronic transactions;

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<sup>323</sup> reg 26.

<sup>324</sup> reg 31.

<sup>325</sup> See [bidorbuy.co.za](http://bidorbuy.co.za), at [www.bidorbuy.co.za/.../South\\_Africa's\\_Largest\\_Online\\_Shopping\\_and\\_Au...](http://www.bidorbuy.co.za/.../South_Africa's_Largest_Online_Shopping_and_Au...), accessed on 21 August 2014, which is an example of an online auctioneer available in South Africa. Bidorbuy is regarded as Africa's largest online shopping website that brings buyers and sellers together in an online marketplace. Sellers can sell anything online and buyers can bid or buy almost anything either on an online auction or at a fixed price.

<sup>326</sup> reg 30(1).

- (iii) provide for easy access to all records prescribed in these regulations in a generally used or accepted medium or format;
  - (iv) keep the information contemplated in regulation 28(4).
- (c) In terms of regulation 30(2) prospective bidders must register by providing their full names, identification or passport number, age, physical address, internet protocol address, and where applicable, login code or name, and password; and the details of the means by which payment will be made.<sup>327</sup>
- (d) An auctioneer may not exclude liability if any goods purchased by auction are not delivered to the purchaser thereof.<sup>328</sup>

In *CJ Digital SMS Marketing CC vs The National Consumer Commission*<sup>329</sup> the Tribunal heard a case where the Applicant operated an online auction business. The case was about an objection to a compliance notice issued by the Commission (Respondent).

The Applicant was CJ Digital SMS Marketing CC t/a Dynabidz, a close corporation, which conducts an online retail business. The Applicant brought an application to the National Consumer Tribunal (Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA.

The Applicant described itself as an online retailer that sells watches, handbags, computer accessories, mobile phones, iPads, iPods, kitchen and dining equipment, perfume and holiday packages, and other similar goods directly to consumers via its website *www.dynabidz.co.za*. Consumers do not purchase goods in the normal sense, instead they register on the Applicant's website and they then bid for goods, in what is known as penny auctions.

After receiving a complaint from the Applicant's customer, the Respondent attempted to resolve the matter with the Applicant in favour of the complainant and when it was unsuccessful it issued a compliance notice.

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<sup>327</sup> reg 30(2).

<sup>328</sup> reg 30(3).

<sup>329</sup> NCT/3584/2011/101(1) [2012] ZANCT 22.

In terms of this compliance notice, the Applicant was instructed to refund the complainant the amount of R1 043 521.95 which she had spent participating on the Applicant's website, failing which the Respondent would seek the imposition of an administrative fine in the amount of R3 million to be imposed on the Applicant by the Tribunal. The Tribunal focused on the following three issues:

- (1) The procedure followed by the Respondent prior to the issuing of the compliance notice.
- (2) Whether the compliance notice complied adequately with the requirements of section 100.
- (3) Whether in the circumstances surrounding this complaint (in particular the fact that the complainant in this matter was seeking compensation for her loss) the issuing of a compliance notice was the most appropriate procedure which should have been followed by the Respondent.

The Tribunal decided not to deal with the business practices of the Applicant.

From the evidence presented, the Tribunal found that the Respondent issued the compliance notice because the Applicant refused to refund the complainant the money which she had spent on the website and not because the Applicant was engaged in prohibited conduct. Therefore the Tribunal held that the Respondent did not follow the processes and procedures as set out in the CPA which governs the investigation of complaints prior to the issuing of compliance notice. The compliance notice was declared to be defective because it did not comply with the requirements of section 100(3)<sup>330</sup> and the Respondent exceeded the bounds of its powers by ordering the Applicant to refund the complainant. The compliance notice was then cancelled and the matter was referred back to the Respondent for a full and complete investigation into the business practices of the Applicant.

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<sup>330</sup> In this regard section 100(3)(c) which provides that the notice must set out the details of the nature and extent of the non-compliance and section 100(3)(d), which provides that the notice must set out the steps which must be taken and the period within which those steps must be taken, are most relevant.

## CHAPTER 5

### LESSONS LEARNT, RECOMMENDATIONS AND CONCLUSION

#### I. EVALUATION OF THE ECT ACT

The ECT Act is a piece of legislation that was passed by Parliament on the protection and safeguarding of interests of an online consumer, thus constituting a shift from the common law and other fragmented pieces of legislation of that era such as the Usury Act 73 of 1968 and relevant industry codes.<sup>331</sup> The ECT Act, however, has some shortcomings, which require amending as illustrated as discussed in the relevant chapters of the dissertation, and summed up below. The amendments will ensure that the ECT Act is up to date and in line with the developments, locally and abroad.

*Some of the necessary and critical consumer protection provisions include:*

- a) The ECT Act contains supplier prohibitions, obligations and consumer rights, just like the CPA.<sup>332</sup> These provisions are aimed at ensuring that the rights of the consumer are protected.<sup>333</sup> The main duties of the supplier or web trader are clearly defined. For instance, the supplier providing an opportunity for the consumer to review, correct and withdraw from the electronic transaction and ensuring that their websites contain the mandatory information contained in section 43(1).<sup>334</sup>
- b) The cooling-off period in section 44 empowers the consumer to cancel any transaction or credit agreement without reason and penalty, within seven days after the date of the receipt of the goods or within seven days after the conclusion of the agreement in respect of rendering of a service by a supplier.<sup>335</sup> The only charge that may be levied by the supplier on the

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<sup>331</sup> See Chap 1 above.

<sup>332</sup> See Ncube 'Consumer Protection: Electronic Transactions Law' supra at 1.

<sup>333</sup> Ibid.

<sup>334</sup> See Chap 2 supra "Scope of application of the ECT Act".

<sup>335</sup> Ibid.

consumer is the direct cost of returning the goods. The fact that there are some transactions that are not covered by the cooling off period such as goods made to the consumer's specifications, does not in my opinion place the consumer in a less favourable position.<sup>336</sup>

- c) In the case of failure by the supplier to perform or comply with the provisions of Chapter VII of the ECT Act, the online consumer can enforce the Act by cancelling the contract, and if applicable, by making the supplier liable for the failure of payment system.<sup>337</sup>
- d) The ECT Act makes it mandatory for the supplier to provide a secure payment system in order to protect the online consumer against fraud, unauthorised access to, interference with data and other forms of internet crimes.<sup>338</sup> Further, the supplier is liable for any damage suffered by the consumer due to failure to provide a secure payment system.<sup>339</sup> This is a commendable safeguard on the part of government, given the high rate of computer related crimes in the country such as fraud, identity theft and the cloning of credit cards which normally take place when unsuspecting consumers transact online.
- e) There is no party autonomy.<sup>340</sup> The ECT Act contains a provision which states that any provision in an agreement which excludes any rights provided for in Chapter VII is null and void.<sup>341</sup> This is a necessary provision that is aimed at ensuring that consumers are not placed in a less favourable position due to complex agreements where some unsophisticated consumers might have read and signed without comprehension.<sup>342</sup>

*The shortcomings of the ECT Act are:*

- a) The fact that the consumer protection provisions of the ECT Act apply to commercial or non-commercial electronic transactions that are concluded between a supplier and a natural person consumer who is the end-user of the goods and services is problematic.<sup>343</sup>

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<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

South Africa is a country where there are so many small, medium and micro enterprises (SMMEs), who may be conducting online shopping on a regular basis for business purposes. For this reason, the exclusion of online consumers who may be vendors, close corporations or companies from the operation of the ECT Act needs to be reconsidered by the legislature. However, since the Bill seeks to make the ECT Act applicable to both natural and legal persons, the shortcoming mentioned above will fall away as soon the Bill becomes law.

- b) Section 47 declares that foreign law applies to electronic transactions conducted between a consumer and a supplier.<sup>344</sup> This section is, however, silent on what will happen in instances where another legal system that does not afford this type of protection governs the contract.<sup>345</sup> It was necessary for the ECT Act to spell out how the contract will be enforced under a completely different legal system, which may provide that foreign law does not apply to the contract. The Bill does not address this challenge; it therefore means that this challenge will continue to exist until the legal position is developed by the courts.
- c) The alternative dispute resolution and redress mechanisms, including the referral of a dispute to the Commission is not clearly spelt out.<sup>346</sup> For instance, the alternative dispute resolution contained in section 69 relates to disputes of the.za domain name space. It appears that a consumer who may not have succeeded in cancelling a contract would have to resort to litigation, which ordinarily, does not come cheap. Unfortunately, the Bill does not seek to amend section 69 to cover the issue of referral of dispute. It is however, my submission that the insertion of the CPA and the alignment of some provisions of the ECT Act, suggests that an aggrieved consumer will invoke the clearly outlined provisions of the CPA in the event of a dispute.
- d) It is not an offence for a supplier to violate most of the provisions of Chapter VII of the ECT Act, except section 45.<sup>347</sup> The only effective remedies available to the online

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<sup>344</sup> Chap 2 supra.

<sup>345</sup> Ibid; See in particular the reasoning by Coetzee in the same Chap 2.

<sup>346</sup> Ibid.

<sup>347</sup> Sections that fall within Chapter VII of the ECT Act are from 42 to 49, and a criminal offence is created under section 89 in the case of violation of section 45 dealing with unsolicited communications.



consumer are to cancel the contract or approach the court for relief. As a result, there is no penalty for failure to comply with Chapter VII by a service provider.<sup>348</sup> I submit that, conduct such as failure to provide a secure payment system by the supplier should also constitute a criminal offence and not civil action only. The Bill does not address this matter either, since the amendment relates to section 45 which deals with for liability for a fine not exceeding R1 million.

- e) As correctly reasoned by Jacobs,<sup>349</sup> there is an urgent need for legal certainty about the consumer protection provisions of the ECT Act. Parliament, through relevant amendments and the courts through interpretation may have to intervene.<sup>350</sup> Sections that need clarification include “the exact content of section 42(2)(a)-(j); the ambit of section 43(1); and the practical effect of cancellation in terms of sections 43, 44, and 46; and the implications of section 47”.<sup>351</sup> The Bill, through clauses 21 to 24 seeks to amend sections 42(1), 43(4) and 46. The Bill therefore intends to address the shortcoming of section 46 and not the other mentioned sections.
- f) The Consumer education and awareness principle as articulated in the OECD Guidelines on Consumer Protection, and the CPA are not available in the ECT Act.<sup>352</sup> Given the fact that online consumer shopping is a growing trend in South Africa, the ECT Act should be amended in order to contain a provision about research and public education. The Bill does not address this issue either.

In a nutshell, the Bill will address some of the challenges in various sections, whilst others will remain as they are. It is however, my belief that since the Bill was introduced for public comments, some inputs may have been made by members of the public and various key industries and it is also possible that they may have already been incorporated into the Bill by

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<sup>348</sup> Section 89 of the ECT Act provides that: 1) A person convicted of an offence referred to in sections 37(3), 40(2), 58(2), 80(5), 82(2) or 86(1), (2) or (3) is liable to a fine or imprisonment for a period not exceeding 12 months. (2) A person convicted of an offence referred to in section 86(4) or (5) or section 87 is liable to a fine or imprisonment for a period not exceeding five years.

<sup>349</sup> Jacobs op cit at 563.

<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> See Chap 1 supra, Introduction.

the Department. Further, the Bill will also undergo its own legislative process where inputs will be made and considered by Parliament. The version that I analysed might change and cover some or remove some of the aspects highlighted.

## II. EVALUATION OF THE CPA (IN GENERAL)

The CPA is a very good and balanced piece of legislation on consumer protection to be passed by Parliament. Although it is pro-consumer, it is very balanced in that it protects the interests of both the consumer and the supplier. The many good provisions of the CPA include:

- a) It was drafted in plain and understandable language and most of its provisions may be understood by sophisticated and non-sophisticated consumers;<sup>353</sup>
- b) Consumers have a right to be provided by the supplier with information when requested, in a plain and understandable language;<sup>354</sup>
- c) It applies to both offline and online consumer transactions occurring in South Africa, and to all legal persons with an annual turnover that is below R2 million;<sup>355</sup>
- d) It is one of the few statutes in South Africa that contains a provision on public awareness and education. The Commission is the custodian of research and public information and must promote public awareness of consumer protection matters including public awareness on the provisions of the Act;<sup>356</sup>

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<sup>353</sup> See, however, Morne Gouws 'A Consumer's Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act' (2010) 22 SA Merc LJ at 79 -94, on her discussion regarding the CPA provisions. Gouws gives an exposition on the plain language provisions of the Act and proposes guidelines for drawing up consumer agreements in plain language. She considers amongst others, section 50, which provides that categories of written consumer agreements, (which may have been prescribed the Minister) must be written in plain and understandable language.

<sup>354</sup> See Chap 3 supra, dealing with key provisions of the CPA.

<sup>355</sup> See Chap 3 supra, dealing with field of application and specific exclusions;

<sup>356</sup> See Chap 3 supra, dealing with key provisions of the CPA.

- e) It extends application to a matter irrespective of whether the supplier resides or has a principal office within or outside the Republic; or is a natural person or juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state;<sup>357</sup>
- f) It contains a comprehensive list of supplier prohibitions and duties, which are practical and enforceable, with clear consequences in the case of failure to comply. These include prohibition against unfair discrimination, misleading or deceiving consumers in respect of the availability or price of the goods and contracting with, or knowingly taking advantage of, persons without legal capacity.<sup>358</sup> For instance, in terms of section 10(1) of the CPA a consumer alleging any unfair discrimination by a supplier, may refer a dispute to the equality court or Commission, which must then refer the complaint to the equality court.
- g) It contains strict liability for damage caused by the supplier's goods, whether harm was caused wholly or partly by those unsafe or hazardous goods;<sup>359</sup>
- h) Enforcement of rights by the consumer in that consumer complaints can be made to the Tribunal, Ombud, Commission, provincial court and other courts;<sup>360</sup>
- i) With regard to redress by court, the court may order a supplier to alter or discontinue any conduct that is inconsistent with the CPA, make any order and award damages against a supplier for collective injury to all or a class of consumers generally;<sup>361</sup>
- j) It contains a clear alternative dispute resolution mechanism wherein the consumer may refer a dispute to an ombud with jurisdiction, an industry ombud, mediator or arbitrator and to a provincial consumer court;<sup>362</sup>
- k) It has a chapter that is solely dedicated to the enforcement of the CPA.<sup>363</sup> All relevant aspects of enforcement are included: namely enforcement by the Commission through the

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<sup>357</sup> Ibid.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Chap 3 op cit.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

issuing of compliance notices; objection to notices by any person (supplier or consumer).<sup>364</sup> It also contains a simplified procedure for the issue of summons and entering and searching any premises in terms of a warrant.<sup>365</sup> Also covered in the chapter are aspects such as breach of confidence; offences relating to prohibited conduct, penalties, administrative fines; vicarious liability; interim relief and civil actions processes.<sup>366</sup>

- l) The administrative remedy of R1 million or not exceeding 10% of the supplier's annual turnover will serve as a deterrent to would be offenders.

#### *Shortcomings of the CPA*

Although the CPA is a straight forward piece of legislation, it would appear, however, from most of the compliance notices cases that were lost by the Commission when they were referred to the Tribunal for adjudication or review that even the enforcers (Commission) of the legislation still have to grapple with the interpretation of the CPA.<sup>367</sup> This may be related to teething problems given that the Commission only started operating soon after the CPA came into operation in March 2011.

### III. EVALUATION OF THE CPA WITH REGARD TO DIRECT MARKETING

The CPA contains provisions on unwanted direct marketing which are reasonable, although there may be some enforcement challenges in certain instances, as illustrated below.

- a) The CPA contains provisions that are a substantial improvement from section 45 of the ECT Act. For instance "Direct marketing" is defined in the CPA and a supplier is prohibited from approaching a consumer, either in person or by mail or any electronic communication, for the direct marketing purposes.<sup>368</sup>

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<sup>363</sup> See Chap 3, dealing with Enforcement of the CPA.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> See Chap 3, Commission's Annual Report for 2012/2013 Financial Year.

<sup>368</sup> See Chap 4, and the section on direct marketing under the CPA.

- b) Another improvement is that the prohibition on direct marketing is not limited to unsolicited electronic communications by means of email (spam) but has been extended to include an approach in person, by mail and by means of all electronic communications such as telephone, fax, sms, wireless computer access, or any similar technology or device.<sup>369</sup>
- c) The CPA recognises and gives effect to the consumer's constitutional right to privacy by restricting unwanted direct marketing.<sup>370</sup>
- d) The time for contacting consumers for direct marketing purposes has been regulated in the Regulations through the notice "Prohibited Time for contacting Consumers". A consumer may not be contacted during the prohibited times unless he or she has consented.<sup>371</sup>
- e) The Commission may establish or recognise a pre-emptive block register and the Minister of Trade and Industry has been empowered to prescribe regulations for the operation of registry where consumers may register a pre-emptive block against any direct marketing by suppliers or marketers.<sup>372</sup> The proposal in the Bill to include an opt-in regime in the ECT Act will complement the CPA.
- f) The registry must at all times be accessible to all persons in the Republic for purposes of registering a pre-emptive block and free of charge.<sup>373</sup>
- g) Any supplier who concludes a transaction or agreement with a consumer through direct marketing must inform the consumer of the right to rescind that agreement. Consequences will follow in the case of failure to do so.<sup>374</sup>

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<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

- h) If a supplier has marketed any goods and left them with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 of the CPA applies. In such an instance, the consumer may end up not paying for the goods and the supplier will be barred from demanding or asserting any right to, or attempt to collect, any payment from a consumer in respect of any charge relating.
- i) The enforcement mechanisms provided in section 69 of the CPA may be invoked by the consumer, including referring the matter to the Tribunal, ombud with applicable jurisdiction, to a dispute resolution agent for conciliation or mediation, filing a complaint with the Commission and approaching a court after exhausting all remedies provided by national legislation.<sup>375</sup> This is a good alternative dispute resolution mechanism that may be invoked and exhausted by a consumer, without following the litigation route.
- j) Offences and penalties outlined in Chapter VI of the CPA, already stated above, will also apply in the event the direct marketer is found guilty of contravening provisions of the CPA.<sup>376</sup>

*Shortcomings of the CPA with regard to direct marketing are:*

- a) The terms “unsolicited” or “communication” (in the context of direct marketing or spam) are not defined in the CPA. The legislature needs to consider defining these terms when amending the CPA.<sup>377</sup> The Bill seeks to address this by defining unsolicited communication, which may settle the challenge.
- b) The provision that direct marketing which was submitted outside of the prohibited times and received by the consumer within the prohibited times does not constitute a breach of this provision on the part of the direct marketer, and that the onus to prove that the direct marketing was dispatched during the allowed period rests on the direct marketer, is a serious concern with regard to enforcement.<sup>378</sup>

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<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

This then means that the direct marketer may send spam within the prohibited times, and the only way of preventing him or her to do so is for the consumer to complain, which may not always be practical.

#### IV. ANALYSIS OF POPI ACT WITH REGARD TO DIRECT MARKETING

The POPI Act has put in place some important safeguards that are aimed at protecting the consumer against a responsible party who may wish to process the consumer's personal information for direct marketing purposes without the consumer's consent. Some of the good provisions of the POPI Act include:

- a) The POPI Act prohibits the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, unless the data subject has given consent or the data subject is a customer of the responsible party.
- b) The POPI Act gives effect to the entrenched right of privacy as guaranteed in the Constitution.
- c) The data subject who is a subscriber to a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which his, her or its personal information is included, must be informed, before the information is included in the directory. No fee must be charged by the responsible party for this service.
- d) The data subject has a right to demand that she be given a reasonable opportunity to object to the use of her personal information and to, in certain instances request the responsible party to verify or withdraw such information. A good measure of this provision is that no fee must be charged by the responsible party for this service.
- e) The POPI Act provides for a dispute resolution mechanism which includes the complainant referring the dispute to the Regulator.<sup>379</sup> There are instances where the

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<sup>379</sup> s 74 of the CPA.

Regulator may refer a matter to the Enforcement Committee for consideration.<sup>380</sup> The POPI Act also makes provision for civil remedies such as suing for damages.<sup>381</sup>

- f) Failure to comply with the provisions of the POPI Act constitutes a criminal offence and the responsible party who interferes with or processes personal information of a consumer in violation of the Act, is guilty of an offence, and is liable to a fine or imprisonment not exceeding 10 years or both.<sup>382</sup>
- h) The CPA and POPI Act are complementary. The CPA asserts the consumer's right to restrict unwanted direct marketing, by refusing to accept, request discontinuation by the direct marketer and to pre-emptively block any approach. The POPI Act on the other hand restricts the processing of the consumer's personal information for direct marketing purposes, without the consent of the consumer, where the protection of the right to privacy is at the heart of it.<sup>383</sup>

*The shortcoming of the POPI Act:*

The only shortcoming is the legislature's failure to define the crucial terms, "unsolicited" and "communication" within the context of direct marketing.<sup>384</sup> As already mentioned, the term unsolicited is also is not defined in the ECT Act and CPA.<sup>385</sup> I submit that the legislature needs to define this critical term when amending the POPI Act. Alternatively, the definition of both terms in the Bill will address the problem.

## V. EVALUATION OF THE CPA WITH REGARD TO ONLINE AUCTIONS

It was imperative that auctions and online auctions in particular be regulated given the increasing internet usage and online shopping by consumers. As argued by Papadopoulos,<sup>386</sup> above the regulation inevitably means that online auctioneers need to overhaul their websites

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<sup>380</sup> s 92.

<sup>381</sup> s 99.

<sup>382</sup> In terms of section 73 of the POPI Act, interference with the protection of personal information of a data subject refers to: any breach of the conditions for the lawful processing of personal information set out in Chapter 3; and in particular, non-compliance with sections 69, 70, or 71 of the Act, dealing with direct marketing.

<sup>383</sup> See both Chap 2 and 4 of the CPA regarding discussions relating to direct marketing.

<sup>384</sup> Ibid.

<sup>385</sup> Ibid.

<sup>386</sup> Op cit at 84.



to a substantial degree in order to comply with the provisions of the law and to offer consumers the much needed protection. Failure to comply will constitute a contravention of the CPA.

## VI. CONCLUSION

During my investigation of the nature and extent of online consumer protection, I was able to establish that all the three pieces of legislation that were passed by Parliament since the dawn of the democratic dispensation, namely, the ECT Act, CPA and POPI Act are pro-consumer. In my main research question, I was able to come up with eight sub-questions, most of which were effectively addressed and answered in the affirmative, one way or the other during the analysis of the three statutes. These pieces of legislation are giving effect to some of the provisions of the Constitution such as the right to privacy and human dignity, especially by regulating the manner in which personal information must be processed for direct marketing purposes.

The ECT Act, despite requiring some critical amendments and refinement in terms of definitions, and relevant clauses such as alternative dispute resolution mechanisms, offences and penalties and research and public awareness, has created a foundation for subsequent legislation such as the NCA and the CPA in that it was the principal statute to regulate electronic commerce and online consumer protection. For instance, Jacobs<sup>387</sup> asserts that “like most e-commerce legislation, the ECT Act is based upon the principles of functional equivalence, technological neutrality, and compatibility with international best practices”.

The ECT Act is, however, silent on several issues such as how the supplier must make the information contained in section 43 available on the website.<sup>388</sup> Suffice to mention that the courts have interpreted some of the provisions of the ECT Act regarding data messages in a manner that ensures legal certainty with regard to SMS and email contracting, and the law is expected to develop with regard to this Act.<sup>389</sup> I am of the opinion that as society evolves, some of the challenges of the ECT Act will be adequately addressed, especially when one notes the good provisions of the Bill. The last comment on the ECT Act that I would like to

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<sup>387</sup> Jacobs op cit at 557.

<sup>388</sup> Ibid at 558.

<sup>389</sup> See *Sihlali v SA Broadcasting Corporation Ltd and Jafta v Ezemvelo KZN Wildlife*, notes 59 and 60 supra.

make is that the need to table the two year old Bill in Parliament and pass it into law cannot be overemphasised.

For the reasons advanced above, I cannot fault the CPA. It is a very good piece a legislation which clearly shows that South Africa has advanced and developed as a democracy. This is also supported by the fact that the Bill seeks to align some of the provisions of the ECT Act with the CPA. The CPA provides a lot of protection to the consumer not only in terms of supplier prohibitions and duties and the entrenchment of consumer rights, it goes on further to provide for offences and penalties and administrative fines in the case of any failure by the supplier to honour the provisions of the Act. It does not, however, end there as the consumer may in certain instances apply for interim relief or institute a civil claim against the supplier or any person in accordance with the provisions of the Act. The regulation of online auctions is also laudable.

It was shown from the work of the Commission as per the Annual Report of 2012/2013 that the Commission is making some strides in promoting and raising public awareness about the CPA and the services that are being offered by the Commission.<sup>390</sup> For instance, 26 488 call centre enquiries and 9 518 complaints were handled by the Commission in one year alone.<sup>391</sup> It is expected that the enforcement challenges with regard to the issuing of compliance notices by the Commission are expected to decrease, as the Commission needs to quickly learn from and apply the precedent setting judgments that were handed down by the Tribunal in the past few years since the CPA commenced. More case law on the interpretation of the CPA by the Tribunal and the courts is also expected to develop as more consumers are becoming aware of their online consumer rights and will assert them accordingly.

With regard to the POPI Act, my submission is that the legislation is fairly new (and most of its sections are yet to fully commence) and it needs to be publicised so that more and more consumers are aware of it. The prohibition on the processing of personal information of a

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<sup>390</sup> See Chap 3 supra, discussion about the Commission's Annual Report.

<sup>391</sup> Ibid.

data subject for the purpose of direct marketing by means of *any* form of electronic communication, unless the data subject has given consent must be welcomed.<sup>392</sup>

In a nutshell, I was able establish in my investigation that South Africa's legislative regime does offer relief or protection to online consumers, and notwithstanding that there is a need for streamlining and refinement, the three statutes also conform to international instruments or directives on consumer protection and electronic commerce, as alluded above.<sup>393</sup> In the quest for efficiency, convenience, choice and better prices, online consumers can be rest assured that their interests will be protected by the law.<sup>394</sup> The challenge that remains though is, for the government to market and publicise these statutes so that they are understood or at least their existence is known by ordinary citizens. Failure to do so may make the laws not to be worth the paper they are written on.

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<sup>392</sup> See Chap 4, discussion on the POPI Act and direct marketing.

<sup>393</sup> As discussed in Chap 1, 2 and 3.

<sup>394</sup> Papadopoulos & Snail op cit at 91.

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